THE STRUCTURE OF OVERSEAS CIVILIAN EMPLOYMENT

FOR DOD CIVIL SERVANTS IN EUROPE

INCLUDING PAY & ALLOWANCES

NOTE: This Outline is a generic outline for Europe. While it has some examples from Italy, the outline is not Italy-specific. The outline should be used as a starting point for research only.

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ABBREVIATIONS

C.F.R.	U.S. Code of Federal Regulations
COLA	Cost of Living Allowance
CONUS	Continental United States (does not include Alaska or Hawaii)
CPM	DOD Civilian Personnel Manual DOD 1400.25-M (USD(P&R) December1996)
DASN (CP/EEO)	Deputy Assistant Secretary of the Navy (Civilian Personnel/ Equal Opportunity)
DSSR	Dept of State Standardized Regulations
Comp. Gen.	Comptroller General
Dir	Directive
DON	Department of the Navy
DOS	Department of State
EUCOM	U.S. European Command
FPM	Federal Personnel Manual
F-OCONUS	Foreign location Outside the Continental United States
HHG	Household Goods
IAW	In accordance with
INST	Instruction
JTR	Joint Travel Regulation
LQA	Living Quarters Allowance
MAJCOM	Major Command
NAVSUP	Naval Supply Command

NF-OCONUS	Non-Foreign location Outside the Continental United States, i.e., Alaska, Hawaii and U.S. possessions such as Puerto Rico
OCONUS	Outside the Continental United States. Generally means outside the United States overseas, but technically includes Alaska and Hawaii.
OCPM	(Navy) Office of Civilian Personnel Management
PA	Post Allowance
PCS	Permanent Change of Station
PDS	Permanent Duty Station
POV	Privately Owned Vehicle, e.g., an employee's car
PPP	Priority Placement Program
SC	Subchapter
SECDEF	Secretary of Defense
TA	Transportation Agreement
TAD	Temporary Additional Duty away from Post
TDY	Temporary Duty away from Post
TQSA	Temporary Quarters Subsistence Allowance
TQSE	Temporary Quarters Subsistence Expense
U.S.C.	United States Code

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THE STRUCTURE OF OVERSEAS CIVILIAN EMPLOYMENT FOR DOD CIVIL SERVANTS IN EUROPE INCLUDING PAY & ALLOWANCES

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February 2005

I. BACKGROUND ON EMPLOYMENT OF HOST NATIONAL EMPLOYEES & THE NATO SOFA.

A. **The NATO SOFA & Division of Personnel**. The NATO SOFA was signed on June 19, 1951, ratified by the Senate in 1953, and entered into force with respect to the United States on August 23, 1953. 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67. The NATO SOFA is the only SOFA ratified by the Senate.

1. The "force" is comprised of military personnel. NATO SOFA, Art I, ¶ 1(a).

2. The "'civilian component' means the civilian personnel accompanying a force ... who are in the employ of an armed service of that Contracting Party." NATO SOFA art I.1(b). For U.S. Forces, the civilian component is comprised of the U.S. civil servants (including appropriated and non-appropriated employees) employed in Europe. For a discussion of restrictions on membership in the civilian component see page 36.

3. "Local civilian labor requirements of a force or component shall be satisfied in the same way as the comparable requirements of the receiving State ... The conditions of employment and work, particularly wages, supplementary payments and conditions for the protection of workers, shall be those laid down by the legislation of the receiving State." NATO SOFA art. IX.4. For a discussion of restrictions on membership in host-national employment, see page 11.

4. There is a separate "Treaty of Paris," July 26, 1961, that covers NATO Headquarters personnel. It applies not only to SHAPE headquarters, but for example, the personnel assigned to other NATO headquarters such as Allied Forces South (AFSOUTH) in Naples.

5. The SOFA is typically supplemented with bi-lateral agreements between the U.S. and the European host-nations.

B. **Why Host Nation Employment Laws Apply to Host Nationals Working For the US Forces**. It's in the NATO SOFA. "The conditions of employment and work, particularly wages, supplementary payments and conditions for the protection of workers, **shall be those laid down by the legislation of the receiving State**." NATO SOFA art. IX.4 (emphasis added). Also, The Foreign Service Act of 1980, and its predecessor, provides that federal agencies should model their employment and pay programs on the **prevailing practice in the locality consistent with the public interest**. 22 U.S.C. 3968 (predecessor section 889). These requirements are reflected in many DOD instructions recounted later in the outline.

C. **Direct & Indirect Hire Systems**. The U.S. Forces in Europe operate "direct hire" systems, that is, the U.S. Forces are the direct employer of the host nation employees, and "indirect hire" systems where the host-nation Ministry of Defense (MOD) is the actual employer of the host nation employees. DOD 1400.25-M SubChapt 1231.4.2 (December 1996).

1. U.K. - U.S. Forces operate both direct hire and indirect hire systems.

2. Spain - U.S. Forces operate an indirect hire system. Spanish employees are under contract with the Spanish MOD, i.e., they are not MOD civil servants.

3. Italy - U.S. Forces operate a direct hire system.

4. Greece - U.S. Forces operate an indirect hire system. Greek employees are under contract with the Greek MOD, i.e., they are not MOD civil servants.

5. Iceland - a unique system that has elements of both the direct hire and indirect hire system.

D. **DOD & EUCOM Policy on Employment Outside the United States**.

1. DOD Dir 1400.6 "DoD Civilian Employees In Overseas Areas" (ASD(MRA&L) Feb. 15, 1980). Establishes basic policy for overseas employment.

3. POLICY

3.1. When using civilian staffing support in overseas areas, each Military Service commander shall employ a civilian manpower mix -- U.S. citizens and local nationals -- that blends financial prudence, conformance with host country agreements or treaties, availability of qualified local national personnel, and the desired low-key presence of the U.S. Government abroad.

3.2. When it is advantageous to employ civilian employees in overseas areas, maximum use shall be made of U.S. and non-U.S. citizens available locally. Unless precluded by treaties or other agreements that give preferential treatment to local nationals, preference shall be given to dependents of military and civilian personnel as provided in DoD Instruction 1400.23 ["Employment of Dependents of Military and Civilian Personnel Stationed in Foreign Areas (Sept. 18, 1974)]. Personnel transferred from or recruited in the United States shall be limited to key personnel, those regarded as essential for security reasons, or those possessing skills that are not available locally.

3.10. When permitted by U.S. and host country treaty or agreement, U.S. law, and management considerations, the Department of Defense shall pattern its employment conditions for locally hired non-U.S. citizen employees after the customs and practices of the area (DoD Instruction 1400.10, ["Utilization by United States of Forces of Local Nationals in Foreign Areas" (June 8, 1965]). Compensation for such employees shall be based upon locally prevailing rates of pay. These employees shall receive the necessary training to equip them to perform their duties, make them more productive, and qualify them for advancement.

2. DOD 1400.25-M, "DOD Civilian Personnel Manual" (USD(P&R) December 1996). The basic manual for civilian personnel issues. Subchapter (SC) 1231 covers employment of Foreign Nationals.

   a. It does not apply to Civilian Marine Personnel of the Military Sealift Command or foreign national employees serviced by U.S. Embassies. SC1231.2

   b. To reduce the need to import U.S. civil servants into foreign countries, foreign nationals shall be employed as extensively as possible by the U.S. Forces consistent with any agreement with the host nation and DOD family member hiring policies. SC 1231.4.1.2.

c. The provisions of the foreign national employment system in a foreign country apply uniformly to all elements of the U.S. Forces. SC1231.4.2.

d. Provides that foreign national employees shall be afforded conditions of employment that are based on prevailing practices, local law, and customs, and are generally equivalent to those enjoyed by persons with similar skills and in similar occupations in the general economy of the host country. SC 1231.4.3.6.

e. Labor Relations. We should follow whatever the prevailing practices are with respect to labor management relations - to the extent they are compatible with basic management needs of the U.S. Forces. SC 1231.4.3.10, *referencing* SC 1231.4.1.1.

3. European Command (EUCOM) policy is that "applicable labor legislation, local customs and practices will be followed in the employment and management of LN [foreign national] to the maximum extent, consistent with international agreements, U.S. laws and operating requirements of the U.S. Forces." EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" ¶7.a.(4) (July 6, 1999).

E. **Employment at U.S. Embassies**. U.S. embassies are the "other" American system overseas - the NATO SOFA does not apply to military or civilian personnel assigned to the Chief of Mission at out embassies. The principal international agreements dealing with embassies are the Convention of Vienna of April 18, 1961, on Diplomatic Relations (the "Vienna Convention on Diplomatic Relations") and the Convention of Vienna of April 24, 1963, on Consular Relations, (the "Vienna Convention on Consular Relations").

II. U.S. LAWS & REGULATIONS APPLICABLE TO HOST NATIONAL EMPLOYMENT.

A. **U.S. Interpretation of International Agreements & International Law**.

1. Treaties & Executive Agreements. Treaties are international agreements entered into with advice and consent of Senate. Executive Agreements are international agreements entered into by the United States without advice and consent of the Senate. Nevertheless, while "an executive agreement ... does not require the advice and consent of the senate before

becoming effective, and is not a 'treaty' in the constitutional sense ... under international law executive arguments [sic] such as the [Korean] SOFA are considered treaties, and as such, become the law of the land **and supersede prior inconsistent domestic law**." B-199054 O.M., 1980 U.S. Comp. Gen. LEXIS 2110 (Comp. Gen. December 16, 1980) (emphasis added), *citing Rossi v. Brown*, 467 F. Supp. 960 (D.C. 1979), and cases cited therein.

2. Interaction of International Agreements & Subsequent Domestic Law. A "subsequent act of Congress supersedes an inconsistent international agreement only if the purpose of Congress to supersede the agreement is clearly expressed." B-199054 O.M., 1980 U.S. Comp. Gen. LEXIS 2110 (Comp. Gen. December 16, 1980), *citing see Rossi v. Brown, supra, Cook v. United States*, 288 U.S. 102 (1932).

B. **Statutory Structure Relating to Host National Employment**. Many laws applicable to foreign national employment are found in the Foreign Relations provisions of the U.S. Code at Title 22 with other relevant provisions scattered in Title 5 and Title 10.

1. Foreign Service Act of 1980. While written primarily for the U.S. State Department, the Title 22 provisions allow other U.S. agencies overseas to establish overseas employment programs. 22 U.S.C. 3968(b). The statutes refer to host national employees as "foreign national employees." E.g., 22 U.S.C. 3968(a)(1). The Secretary of State has statutory authority to issue government-wide "regulations governing the establishment and administration of local compensation plans" but has not done so. 22 U.S.C. 3968(c).

2. Classification Act of 1949, 5 U.S.C. 5101. Describes the types of U.S. civil service pay plans. This Act is interpreted as a bar to hiring U.S. citizens as foreign national employees.

3. Pay – Basic Authorization for Pay of Foreign National Employees, 10 U.S.C. 1584.

4. Pay - Congressional Pay Cap on Host National Pay Raises. In § 8002 of the annual DOD Appropriations Act *codified at* 10 U.S.C.A. 1584 (note).

5. Pay - Maximum Salary for Foreign National Employees. The maximum salary limit applies where an agency "is authorized to fix by administrative action the annual rate of basic pay ... ." 5 U.S.C. 5373(a).

6. Base Closures and Severance Pay for Foreign National Employees, 10 U.S.C. 1597.

7. Foreign National Employees Separation Pay Account, 10 U.S.C. 1581(a), (e).

8. Wage Surveys for the U.S. Federal Wage System (blue collar system) are generally discussed at 5 U.S.C. 5344. Wage surveys can be used to set foreign national pay.

C. **DOD Directives & Manuals Regarding Foreign National Employees**.

1. DOD Dir 1400.6 "DoD Civilian Employees In Overseas Areas" (ASD(MRA&L) Feb. 15, 1980). Establishes basic policy for overseas employment.

2. DOD Dir 1400.25 "DOD Civilian Personnel Management System" (ASD (FMP) November 25, 1996). The Assistant Secretary of Defense for Force Management Policy, within the office of the Under Secretary of Defense for Personnel and Readiness, is responsible for promulgating DOD Publications to implement DoD policy and civilian personnel management procedures. Largely, implemented by the "DOD Civilian Personnel Manual," DOD 1400.25-M (USD(P&R) December 1996).

3. DOD Dir 5120.39 (Ch 1.), "Department of Defense Wage Fixing Authority - Appropriated Fund Compensation" (ASD(MRA&L) Nov. 16, 1994).

4. DOD Dir 5120.42 (Ch. 1), "Department of Defense Wage Fixing Authority - Non-appropriated Fund Compensation Programs" (ASD(MRA&L) Nov. 16, 1994).

5. DOD 1400.25-M, "DOD Civilian Personnel Manual" (USD(P&R) December 1996). The basic manual for civilian personnel issues.

6. DOD Manual 1416.8-M "Manual for Foreign National Compensation" (ASD(FM&P) January 1990). Contains detailed procedures for conducting wage surveys and the administration of foreign national compensation programs.

D. **Service Instructions**.

1. SECNAVINST 5402.28A "Delegation of Authority for Determining Compensation and Conditions of Employment of Non-U.S. Citizen Employees in Overseas Areas" (OP-141C3 July 27, 1984).

E. **EUCOM & Tri-Service Instructions**.

1. EUCOM Dir 30-2 "Personnel - Coordination of Policy Development, U.S. Civilian Personnel" (July 24, 1995).

2. EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" (July 6, 1999).

3. For Italy - The "Tri-Component Instruction" CINCUSNAVEURINST 5840.2D, USAREUR Reg 550-32, USAFE Inst. 36-101, "Regulations on Personal Property, Rationed Goods, Motor Vehicles and Drivers' Licenses, Civilian Component Status, and Access to Facilities by Italian Labor Inspectors" (April 4, 2001). A cats-and-dogs instruction as per title, including the rules for determining civilian component status.

F. **Commander U.S. Naval Forces Europe Instructions** (COMUSNAVEUR INST), previously this command was the Commander in Chief, U.S. Naval Forces Europe (CINCUSNAVEUR or CNE).

1. COMUSNAVEUR INST 5450.15F "Functions and Tasks of the Commander, U.S. Naval Forces Europe Force Civilian Personnel Director; Director, Civilian Personnel Programs; And Command Deputy Equal Employment Opportunity Officer" (CNE 016 July 21, 2003).

2. COMUSNAVEUR INST 5830.2C "Administrative Investigations" (CNE 013 June 14, 2001), includes mention of litigation reports which is out of date with respect to litigation reports for cases in foreign courts.

3. CINCUSNAVEUR INST 12000.1 "Personnel Manual for United Kingdom Employees" (CNE 016 12 Jan 01).

III. EUROPEAN UNION EMPLOYMENT LAW.

A. **EU Law Constitutes a Backdrop**. Although the U.S. is not a member of the European Union (EU), EU laws on employment provide a backdrop to employment law in the member countries. Typically, member nations have to pass laws to implement EU laws or directives. (EU regulations, on the other hand, apply to member states immediately.) EU laws and directives then become a condition of employment of the host nation and applicable to the U.S. Forces employment of host nation employees by NATO SOFA art. IX.4. EU directives will play an increasingly important role in employment by U.S. Forces in Europe.

1. EU Regulation 1612/1968 prohibits EU national origin discrimination in hiring by employers in EU member countries. In other words, local employers cannot have a preference for employees of a particular EU nationality, e.g., no preference for Italians in Italy etc.

2. The most important of recent EU directives affecting Italian employment are directives on:

   - Part-time workers (EU Dir 81/1997);

   - Fixed-term workers (CE70/1999); and

   - Parental leave (CE 34/1996).

3. Near-term EU initiatives include:

   - Telework;

   - Temporary work agencies.

B. **The Rome Treaty (1957)**, established the "Common Market" and contained embryonic social policy. Provided for:

1. Free Movement of Workers (Art. 39) including:

   a. Abolition of restrictions on movement of workers;

   b. Rights of entry and residence;

   c. Social security coordination - regulating social security payments as the employee moves from country to country.

2. Equal pay for equal work for male and female employees. Rome Treaty, Article 140. Four directives on Equal Treatment have been issued.

3. Harmonization of Legislation on Worker Protection. Directives have been issued on collective redundancies (RIFs), transfers of businesses, and employer insolvency. The directives allowed the member nations to implement by different means, e.g., legislation or "arrangements" between management and labor.

C. **Single European Act (1986)**. Marked a shift from the Common Market, which was never really achieved, to a Single European Market allowing for the movement of capital, labor and goods. Established a Council of Ministers with "weighted voting" known as Qualified Majority Voting.

1. Covered Worker Health and Safety.

2. Working Time Directive issued in 1993, included items such as mandatory rest times.

3. Charter of Fundamental Social Rights of Workers (1989).

D. **Maastricht Treaty (1992)**. Generally known for aiming for a Social Europe with "Two Speeds," one speed for 14 of the member states with a second (slower) speed for the UK. Employment directives issued under the treaty include:

1. European Works Council Directive (No. 45/1994);

2. Parental Leave Directive (1996);

3. "Burden of Proof" Directive (1997) reversing the burden of proof in sex discrimination cases;

4. Part-time Work Directive (1997).

E. **Amsterdam Treaty (1997, effective May 1, 1999)**.

1. Part of a response to unemployment problems and the need to create jobs in the EU.

2. Added Article 13 to the 1957 Rome Treaty, dealing with discrimination on the basis of race, ethnic origin, religion and sex. The concern was driven in part over expansion of the EU into former Warsaw Pact nations. Article 13 needs to be implemented by member nations in their domestic law.

3. Eliminated the "two speed" program; UK now fully joined.

4. Stronger emphasis on Gender Equality. Allows for "positive discrimination" (affirmative action(?)). Member states may provide advantages for under-represented group (legislative note relates the under-represented group is women) in professions.

5. Chapter on Employment Policy calling for:

   a. A coordinated employment strategy;

   b. EU employment guidelines replaced the attempt at harmonization of the rules; and

   c. Measures to stimulate employment.

IV. EMPLOYMENT PROGRAMS FOR HOST NATIONAL EMPLOYEES.

A. Basic Authorization for Host National Employment Programs.

1. "Local civilian labor requirements of a force or component .. ." NATO SOFA art IX.4.

2. Basic Authorization for Overseas Employment Programs. Although §3968 was written for the Department of State, all U.S. agencies operating overseas are authorized to establish employment programs for foreign national employees. 22 U.S.C. 3968(b).

3. Basic Authorization for Position Classification. Federal agencies operating overseas "shall establish compensation **(including position classification**) plans for foreign national employees ... ." 22 U.S.C. 3968(a)(1) (parenthetical comment in original, emphasis added).

4. Office of Personnel Management (OPM) Rule. "Persons who are not citizens of the United States may be recruited overseas and appointed to overseas positions without regard to the Civil Service Act." 5 C.F.R. 8.3.

B. **Eligibility for Host Nation Employment**.

1. NATO SOFA. The SOFA simply relates to "[l]ocal civilian labor requirements ... ." SOFA art. IX.4. Either bi-lateral agreements, union contract provisions, or hiring practices limit local employees to citizens of the host nation. Note that EU Regulation 1612/1968 prohibits hiring preferences based on citizenship among EU members.

2. Inability of US Citizens to be Hired as Host Nation Employees.

   a. The Classification Act of 1949. This Act is interpreted as a bar to hiring U.S. citizens as foreign national employees; the law is commonly misstated as requiring U.S. citizens to be paid in dollars. Instead, the statute provides that the General Schedule (GS) pay system applies to all positions in a federal agency, 5 U.S.C. 5101, except those positions excluded by § 5102. One of the exceptions in §5102(c)(11) is for "aliens or noncitizens" of the U.S. who occupy positions outside the United States, i.e., host national employees. There is no exception from GS for U.S. citizens who occupy positions outside the United States.

      (1) Thus, if you are a U.S. citizen, you should be employed and paid as a GS, while host national employees are in a separate employment schedule and are paid in local currency. So, U.S. citizens (including dual nationals) should not be employed as host national employees in appropriated fund positions.

      (2) The Classification Act restriction only applies in direct hire countries (e.g., Italy) where the U.S. is the actual employer of the LNs. It does not apply in indirect hire countries where the host nation Ministry of Defense actually employs the LNs, e.g., Greece and Spain.

   b. Hiring a U.S. citizen as a host national employee is also inconsistent with DOD regulations. A "Foreign National Employee" is defined as a "non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions." DOD 1416.8-M, Manual for Foreign National Compensation, DL 1.1.4. (ASD(FM&P) January 1990).

C. **Host National Employee Pay**.

1. Basic Rules for Foreign National Pay.

   a. DOD's Ability to Fund – Basic Authorization Foreign National Employees Pay. From time-to-time, the annual appropriations act has a ban on payment of appropriated funds as salaries to individuals who are not U.S. Citizens. Such laws prohibiting the payment of pay or expenses to a person not a citizen of the United States do not apply to DOD personnel. 10 U.S.C. 1584.

   b. Pay & The Foreign Service Act of 1980. The key to designing and operating a foreign national employment program is Section 408 of the Foreign Service Act of 1980, codified at 22 U.S.C. 3968, which requires that federal agencies model their employment program on the **prevailing practice in the locality consistent with the public interest**. 22 U.S.C. 3968(a)(1) (predecessor section is 889). With very few exceptions, if an employment practice is a prevailing practice in the locality, the U.S. Forces can implement the practice even if it is contrary to employment practices for American employees, or contrary to U.S. employment or fiscal laws. Under the provisions of 22 U.S.C. 889, "compensation plans for aliens need not be limited by laws and regulations applicable to [American] employees subject to the civil service laws and regulations generally, and that where such plans are consistent with the local practice and in the public interest, no question would arise as to the availability of appropriations to meet the cost of such plans." 51 Comp. Gen. 123, B-173210, 1971 U.S. Comp. Gen. LEXIS 68 (August 24, 1971). The "prevailing practice in the public interest" is the standard for determining whether an employment practice can be adopted.

      (1) Legislative History. The Foreign Service Act of 1946 was amended by adding the "provision in section 889 providing for the setting of compensation plans based on locality prevailing wage rates was added by a 1960 amendment, section 6 of public law no. 86-723, September 8, 1960 (74 Stat. 831) ... ." B-199054 O.M., 1980 U.S. Comp. Gen. LEXIS 2110 (Comp. Gen. December 16, 1980) (discussing 29 U.S.C. 889, the predecessor to 3968). The provisions of section 889 were modified and transferred to section 3968 in section 408 of the Foreign Service Act of 1980.

      (2) The Foreign Service Act of 1980, is PL 96-456, 94 Stat 2071 (Oct 17, 1980). The bills involved were: 96 HR 4674; 96 S. 1450; 96 S. 3025; 96 HR 6790; 96 S. 3058.

c. Congressional Pay Cap on Host National Pay Raises. The pay cap first appeared in the DOD appropriations act in 1987 and then for every year since 1989. Sec. 8002 P.L. 106-79 "DOD Appropriations Act 2000" (25 Oct. 1999) *codified at* 10 U.S.C.A. 1584 (note). It limits pay raises for foreign national employees to the higher of the percentage increase to the basic pay raise for DOD GS employees (i.e., without locality pay) or the percentage increase the host nation gives its own civil servants. Note: there are no Comptroller General decisions interpreting the pay cap on raises.

d. Maximum Salary for Foreign National Employees.

(1) The Statutory Limit. The maximum salary limit applies where an agency "is authorized to fix by administrative action the annual rate of basic pay ... ." 5 U.S.C. 5373(a). "[B]y administrative action" means the agency, not Congress, sets the basic rate of pay. The annual rate of basic pay cannot be fixed at a rate more than the rate for level IV of the Executive Schedule. 5 U.S.C. 5373(a). The annual rate of basic pay for an employee paid from nonappropriated funds may not be fixed at a rate greater than the rate for level III of the Executive Schedule. 5 U.S.C. 5373(b).

(2) DOD Limits - The "Manual for Foreign National Compensation." "The total annual pay for an employee established under the delegated authorities may not be more than the maximum payable rate for General Schedule **(GS)-18**." DOD 1416.8-M ¶C1.2.3.2.3. (ASD(FM&P) January 1990) (emphasis added).

(3) DOD Limits - "DOD Civilian Personnel Manual." "The total pay for an individual established under delegated authorities may not be more than the maximum payable rate for **Executive Level IV**." DOD 1400.25-M SubChapt 1231.5.3.3 (USD(P&R) Ch.2 January 12, 1998) (emphasis added). GS-18 and Executive Level IV pay, are the same. The GS-18 grade was eliminated between the 8 years of the two instructions.

(a) Positions at grades GS-16, GS-17, and GS-18, were replaced by Senior Level (SL) Positions under the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509). SL positions are classified above GS-15 of the General Schedule but are ungraded. U.S. Office of Personnel Management, Operating Manual Update,

"Glossary of Terms Used in Processing Personnel Actions" at 35-13 (Update 35 October 1, 2000) *citing* 5 C.F.R. part 319.

(4)

Pay/YR	2001	2002	2003
GS-18*	$96,652 - 125,700	99,096 - 130,000	102,168 - 134,000
ES-IV	125,700	130,000	134,000
ES-III	133,700	138,200	142,500

* Range for SL pay.

(5) The Executive Schedule Levels of Pay should not be confused with the Senior Executive Service (SES) pay levels. The Executive Schedule has five levels with Level I the highest.

(a) E.S. Level I is for members of the Cabinet, e.g., Secretary of State, Secretary of Defense. 5 U.S.C. 5312.

(b) E.S. Level III is typically for the Under Secretary level, e.g., the Under Secretary of Defense (Personnel Readiness), the Under Secretary of State. 5 U.S.C. 5314.

(c) E.S. Level IV is typically for the Under Secretaries of the three services, e.g., the Under Secretary of the Navy, the Assistant Secretaries of the services, e.g., the Assistant Secretary of the Navy (Manpower & Reserve Affairs), the DOD General Counsel and the General Counsels for the three services. 5 U.S.C. 5315.

(6) The SES on the other hand has six levels (6 being the highest and 1 the lowest). The pay for SES ranges from 120% of GS-15 for SES 1 to Executive Service Level IV for SES 6. 5 U.S.C. 5382(b), 5376(b)(1).

e. DOD & EUCOM Policy on Host National Employee Pay. There are two basic policies regarding the establishment of foreign national pay:

(1) **The average pay** of foreign national employees of the U.S. Forces shall equal the average pay of the non-U.S. Forces sector

in the host nation DOD Manual 1416.8-M, ¶C1.2.3.1.1 (ASD(FM&P) January 1990); and

(2) **The total compensation** of employees of the U.S. Forces shall equal the total compensation of the non-U.S. Forces sector in the host nation. DOD Manual 1416.8-M, ¶C1.2.3.1.2 (ASD(FM&P) January 1990).

(3) Terms and conditions of employment will be favorable enough to meet existing fair standards in the labor market but not so advantageous as to create a privileged group within the country. EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" ¶7.a.(6) (July 6, 1999).

(4) Compensation levels and conditions of employment should normally be comparable to those governing similar occupations in the host nation economy, or, when appropriate, comparable to similar wage and salary scales of the host nation civil service. EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" ¶8.a.(3)(a) (July 6, 1999) .

(5) "If inclusion of the host government (national, state, and local levels) is not feasible, document the reasons for its exclusion and include the documentation in the country plan or in survey reports to the ASD(FM&P)." DOD Manual 1416.8-M "Manual for Foreign National Compensation" ¶C3.2.7 (ASD(FM&P) January 1990).

f. Interest Bearing Accounts Are Authorized. "[P]ayments by the Government and employees to a trust or other fund in a financial institution in order to finance future benefits for employees, **including provision for retention** in the fund **of accumulated interest** for the benefit of covered employees." 22 U.S.C. 3968(a)(1)(C) (emphasis added).

g. Social Security Plans. Participation in local social security plans is specifically authorized in the Foreign Service Act. 22 U.S.C. 3968(a)(1).

h. Foreign National Pay & Protection for Comptrollers. In Columbia the prevailing practice in the locality allowed employees to take advances on their severance pay. The employees however, could

lose eligibility for the advance pay if, e.g., they were fired for cause. Because the disqualification, e.g., the termination for cause, could take place after the employee had already borrowed the money, the State Department was concerned that its certifying officers who made the payments would be liable under 31 U.S.C. 82c (1976) for incorrect payments. GAO held not. "As a general proposition, if certifications are made in accordance with the conditions set forth above, then the certifying officer would not be held liable for otherwise proper payments if the FSN employee should subsequently lose his eligibility for severance pay, for causes which did not exist at the time of the payment, or which existed but which the certifying officer did not know of and had no reason to know of." B-192511, 1979 U.S. Comp. Gen. LEXIS 2456 (Comp. Gen. June 8, 1979).

i. The Comptroller General Treats Agency Regulations with Extraordinary Deference. GAO denied payment of a night differential, in part, because the State Department had issued regulations requiring approval in Washington for payment of night differentials, and Voice of America officials in Antigua had failed to get such approval before implementing the differential. *Matter of VOA Relay Station, Antigua*, B-227411, 1988 U.S. Comp. Gen. LEXIS 494 (Comp. Gen. May 19, 1988).

j. Leave Provisions. Statutes discussing leave are somewhat inconsistent.

(1) The Foreign Service Act provides for:

- leave with pay, in accordance with prevailing law and employment practices in the locality without regard to restrictions in U.S. law, 22 U.S.C. 3968(a)(1)(A);

- programs for voluntary transfers of leave and voluntary leave banks, 22 U.S.C. 3968(a)(1)(B).

(2) While the Title 5 provision relates that "alien employees who occupy positions outside the United States" may be granted "leave of absence with pay, not in excess of the amount of annual and sick leave allowable to [American] citizen employees" under Title 5. 5 U.S.C. 6310.

(3) In practice, federal agencies follow the Title 22 provision and provided for leave in accordance with practices in the locality.

(4) Absence Resulting from Hostile Action Abroad. Whether leave is granted to an "alien employee under section 6310 ... or section 408 of the Foreign Service Act of 1980 [22 U.S.C. 3968]" leave may not be charged due to an absence "not to exceed one year, due to an injury - (1) incurred while serving abroad and resulting from war, insurgency, mob violence, or similar hostile action ... ." 5 U.S.C. 6325. Unless, the absence or the mob action (the statute isn't clear) is "due to vicious habits, intemperance, or willful misconduct on the part of the employee." 5 U.S.C. 6325(2). This same provision applies to American civil servants.

2. What the "Prevailing Wage Rate" Criteria Allows Agencies To Do.

a. Advances on Salary Otherwise In Violation of U.S. Laws. The Comptroller General approved advances on salary for SETAF local national (Italian) employees, which for American employees would have violated 31 U.S.C. 529 and 665(a) prohibiting payments in advance of services or in advance of appropriations. This even though there was "no Italian law specifically governing salary advances or loans to personnel of private employers." The Comptroller General approved the payments because "it is local custom and practice for industrial employers to make such payments. ... Accordingly, if the department determines that payments similar to that here involved are in the public interest and the matter of adopting such practice is coordinated with other agencies of the United States operating in Italy, we will not object to the payment of the instant voucher and others similar thereto." B-166917, 1969 U.S. Comp. Gen. LEXIS 2544 (June 10, 1969).

b. Advance Pay.

(1) Prevailing Practice Rule. Despite statutory restrictions ordinarily applicable to federal agencies with respect to advances on pay, advance pay may be provided to host national employees if such payments are the prevailing practice in the locality. B-192511, 1979 U.S. Comp. Gen. LEXIS 2951 (Comp. Gen. February 5, 1979) (advance severance pay).

(2) Advance Pay for Medical Treatment. Up to three months advance pay can be paid to a host national employee who is located outside the country where hired pursuant to agency

authorization and "requires medical treatment" outside country where hired. 5 U.S.C. 5927(a)(3).

c. Transfers Between Appropriated Fund and Non-Appropriated Fund Without Loss of Benefits. Executive Agreement between U.S. and the Republic of the Philippines provided that the U.S. Forces were a single employer and employees could transfer between appropriated fund and non-appropriated fund activities without loss of leave, length of service computations, severance pay etc. Under the provisions of 22 U.S.C. 889 "compensation plans for aliens need not be limited by laws and regulations applicable to [American] employees subject to the civil service laws and regulations generally, and that where such plans are consistent with the local practice and in the public interest, no question would arise as to the availability of appropriations to meet the cost of such plans. Therefore, we see no legal objection to regarding the United States Armed Forces in the Republic of the Philippines as one employer in order to permit the benefits in question and to give full effect to the terms of the agreement." 51 Comp. Gen. 123, B-173210, 1971 U.S. Comp. Gen. LEXIS 68 (August 24, 1971).

d. Retroactive Pay Allowed.

(1) Generally, American civil servants have "no entitlement to retroactive pay absent a provision in an employment contract or express statutory authorization." Given the provision of 22 U.S.C. 889, "such limitation would not necessarily apply to foreign nationals employed outside the United States by the United States government" where the prevailing practice in the locality was to make retroactive payments "provided such payments are determined to be consistent with the public interest and the agency pay practice is coordinated with other agencies of the United States operating in Canada." B-191860, 1979 U.S. Comp. Gen. LEXIS 3044 (January 10, 1979), *citing see* 40 Comp. Gen. 650 (1961). The specific situation in Canada was that there was a lag between the expiration of union contracts and the date a new contract was accepted. Not only did Canadian employees receive the pay increase retroactive to the expiration of the prior contract, so too did former employees separated by retirement, resignation, or reduction in force.

(2) GAO allowed retroactive payment of pay where the agency's implementing regulations allow it **and** it was a prevailing practice in the locality. *Matter of VOA Relay Station, Antigua,*

B-227411, 1988 U.S. Comp. Gen. LEXIS 494 (Comp. Gen. May 19, 1988) ("The applicable [internal State Department] regulations pertaining to retroactive increases provide that premium compensation pay, such as night differential, cannot be retroactively granted unless data is available indicating it is a local prevailing practice in the area to grant a retroactive increase.").

(3) Note that the applicable DOD regulation practically forbids retroactive payments. DOD 1416.8-M "Manual for Foreign National Compensation" ¶C3.6 (ASD(FM&P) January 1990).

e. Where There Is No Prevailing Practice - Host national Filipino base guard denied pay for pre-shift muster and relief transport time where local practice in the Philippines was to not pay guards for muster and transportation time. B-186957, 1977 U.S. Comp. Gen. LEXIS 2939 (Comp. Gen. February 9, 1977).

f. Not All Prevailing Practices Are Allowed - The Statute Only Stretches So Far. The agencies are allowed to follow most, but not all, "prevailing practices." In Columbia, it was prevailing practice for employers to advance pay to employees, and if the employee was terminated before the advance was paid off, to waive collection of the advance pay owed. GAO agreed to the advance pay but not to the waiver of collection. The "Department may not, solely because practice of local employers is not to seek recovery, refrain from collection efforts when alien employee loses eligibility for certain compensation. Federal claims collection act mandates attempts to recover." B-192511, 1979 U.S. Comp. Gen. LEXIS 2456 (Comp. Gen. June 8, 1979), *citing* 31 U.S.C. 951-953 (1976). Presumably the failure to collect a debt owed the U.S. government would be inconsistent with the public interest, but oddly, that was never discussed in the decision.

3. Host National Compensation Plan must Be "Consistent with the Public Interest." 22 U.S.C. 3968(a)(1). The public interest requirement is not a separate basis for establishing a component of pay - all pay components must be a prevailing practice **and** consistent with public interest. B-199054 O.M., 1980 U.S. Comp. Gen. LEXIS 2110 (Comp. Gen. December 16, 1980) ("we do not believe that the above-quoted phrase ['to the extent it is consistent with the public interest'] grants authority for an agency to adopt a practice that is not a prevailing wage rate or compensation practice for corresponding types of positions in the locality.")

4. Coordination With Other Federal Agencies. Based on the legislative history of section 889, the Comptroller General wants federal agencies to coordinate implementation of the compensation programs. B-166917, 1969 U.S. Comp. Gen. LEXIS 2544 (June 10, 1969) (salary advances and loans were a prevailing practice and could be adopted by the Army when the "practice is coordinated with other agencies of the United States operating in Italy"); 40 Comp. Gen. 650; B-145804, 1961 U.S. Comp. Gen. LEXIS 141 (May 26, 1961) (purchase of insurance plans for health and retirement programs were a prevailing practice and could be adopted by the State Department which "should be co-ordinated with other agencies operating in the locality so that the same or a substantially similar practice will be followed by each of the other agencies operating in that area."). Coordination is also required by the DOD Manual for Foreign National Compensation. DOD 1416.8-M C3.5.1.3. (ASD(FM&P) January 1990).

5. How a Prevailing Practice Is Determined in DOD. The Comptroller General issued a decision interpreting "prevailing wage rates and compensation practices" in 22 U.S.C. 889(a), the predecessor to 22 U.S.C. 3968(a)(1), which is recounted in the DOD Manual for Foreign National Compensation. DOD 1416.8-M C3.5.1 (ASD(FM&P) January 1990), *quoting* 40 Comp. Gen. 650, B-145804, 1961 U.S. Comp. Gen. Lexis 141 (May 26, 1961). To be a prevailing practice:

    a. The practice should be substantially followed by local employers in the area, C3.5.1.1;

    b. Adoption of the practice should be consistent with the public interest, C3.5.1.2;

    c. The manner of adopting the practice should be coordinated with other U.S. government agencies so that the same or a substantially similarly practice will be followed by each Agency operating in that area, C3.5.1.3;

    d. Plus DOD provides "the following additional guidance:"

        (1) An employment practice shall be considered to be a prevailing practice when a majority of survey firms employing a majority of the survey population follows the practice. C3.5.2.1.

        (2) Any rate or level paid by a simple majority of the survey firms shall be considered to be a prevailing practice, providing the

number of employees at the rate or level exceeds the number receiving any other rate or level. C3.5.2.1.2.

(3) Application of the two provisions above "must be consistent with operational requirements and compatible with the basic management needs of the U.S. Forces." C3.5.2.2.3.

D. **DOD Directives & Manuals Regarding Host National Employee Pay**.

1. DOD 1400.25-M, "DOD Civilian Personnel Manual" (USD(P&R) December 1996). Subchapter 1251 covers Compensation of Foreign Nationals.

   a. Does not apply to MSC civilian marine personnel or foreign national employees serviced by U.S. embassies. S.C. 1251.2.

   b. The Assistant Secretary of Defense for Force Management Policy (ASD(FMP)) reporting to the Under Secretary of Defense (Personnel and Readiness) (USD(P&R), has program responsibility and approve exceptions to the provisions of DoD 1416.8-M. S.C. 1251.4.1.

   c. The DOD Civilian Personnel Management Service (CPMS) provides technical advice on compensation and reviews reports of country compensation plans. S.C. 1251.4.2.

2. DOD Manual 1416.8-M "Manual for Foreign National Compensation" (ASD(FM&P) January 1990). Contains detailed procedures for conducting wage surveys and the administration of foreign national compensation programs. Superseded DOD 1416.8-M "DoD Manual for Foreign National Compensation (Dec 1980).

   a. The Manual represents "the preferred methodology for wage determination ... ." Departure from these procedures must receive prior approval of the Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P). DOD 1416.8-M ¶C1.2.3.1.1.1. (ASD(FM&P) January 1990).

      (1) Unresolved differences [presumably between the services] relating to ... wages ... shall be referred by the cognizant commander in chief to the ASD(FM&P). ¶C1.2.3.2.1.

(2) Deviations from the prevailing practice, sometimes referred to as **public interest determinations**, shall be referred by the cognizant commander in chief to ASD(FM&P).

b. The Manual **does not** apply:

(1) To designated DOD units authorized to use the Dept of State Joint Compensation Plan for Local Employees - instead an interagency Memorandum of Agreement applies. Typical units that the Manual does not apply to are the U.S. Information Agency, military or agricultural attachés, AID Missions, and such. The Memorandum of Agreement is in DoD 1416.8-M app. 1 (January 1990).

(2) To indirect hire systems where the U.S. Forces, by agreement, use host government compensation system, and the U.S. Forces do not retain pay fixing authority; however, the total compensation comparability provisions apply in all cases." DOD Manual 1416.8-M, Forward (ASD(FM&P) January 1990).

(a) Nevertheless the Manual "shall be used to establish bargaining parameters for agents negotiating for the U.S. Forces in indirect hire situations where country-to-country or other agreements provide for the negotiation of wages and benefits." DOD Manual 1416.8-M, Forward (ASD(FM&P) January 1990).

c. Definitions:

(1) "Foreign National Employee" is a "non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions." ¶DL1.1.4.

(2) "Base Pay" is that "part of U.S. Forces total pay" from which "premium pay and certain other allowances" are computed. ¶DL1.1.1.

(3) "Benefit Component" is the "fringe benefits granted by U.S. Forces to foreign national employees" and by host nation "employers to their employees." ¶DL1.1.2.

(4) "Consolidated Allowance" is an "allowance paid by the U.S. Forces to represent a wide variety of non-U.S. Forces pay that is considered

in arriving at total pay for positions comparable to U.S. Forces positions." ¶DL1.1.3.

(5) Pay and Benefit Components are listed in DOD 1416.8-M app. 2 (January 1990).

d. Grading Structures & Classification.

(1) All components of U.S. Forces must adopt and uniformly apply the same grade and step-rate structure within a country. Manual 1416.8-M, ¶C2.1 (ASD(FM&P) January 1990).

(2) Host nation prevailing practices are the key to the grade structure and classification for host nation employees. The U.S. GS and FWS grade structures may be used if compatible with host nation practices, otherwise an alternative has to be developed. ¶¶C2.2. & C2.3.

e. Wage Surveys & Benefit Analysis. Chapter 3 contains an extensive discussion on how to conduct full-scale wage surveys including regression analysis while Chapter 4 discusses benefits. "A full-scale survey includes developing a current sample of establishments and collecting salary, wage, and benefit data by visits to these establishments." C3 Introduction. The discussion of benefits analysis provides general guidelines. Update Surveys are discussed in Chapter 5. Reports are discussed in Chapter 7.

(1) Full-scale wage surveys should be done "at least very 3 years, or more frequently if economic conditions are unstable." ¶C3 Introduction.

(2) Update surveys are conducted in intervening years.

(3) The wage survey area "normally encompasses the area surrounding the U.S. Forces work sites within which the predominant number of employees reside, and within which workers may change employers without changing residences." ¶C3.2.6.1. The survey area can be expanded if there is an insufficient industrial base or significant recruitment from elsewhere. ¶C3.2.6.1.

Comment: The instruction does not explain why host-nation companies should be interested in taking the time and expense to participate in the studies. Nor does the instruction authorize payment to these companies.

(4) Survey industries should come "from the broadest feasible universe of non-U.S. Forces industries, including civilian and military branches of the host government. If inclusion of the host government (national, state, and local levels) is not feasible, document the reasons for its exclusion and include the documentation in the country plan or in survey reports to the ASD(FM&P)." ¶C3.2.7.

(5) To avoid the appearance of a conflict of interest, the instruction suggests that each data collector team have no more than one host national employee member. ¶C3.3.2.

f. Alternatives to Surveys. The alternatives discussed in Chapter 6 do not applicable to the European Theater.

Comment: The discussion on alternatives to surveys does not include purchasing wage data from employer federations.

g. When Do Pay Raises Become Effective? "The general policy for selecting the effective date for changes in compensation and conditions of employment is that such changes shall be effective no earlier than the date competent administrative authority (in this case the component to whom wage fixing authority has been delegated) takes final action to approve changes. ... Unless unquestionable legal authority for retroactive changes exists, all changes in compensation and conditions of employment shall be effective no earlier than the date the wage fixing authority takes final action to approve the changes." DOD 1416.8-M ¶C3.6 (ASD(FM&P) January 1990).

(1) Exceptions to the general policy can be justified under the authority of "specific provisions of controlling treaties and agreements" or the Foreign Service Act of 1980 "if supported by local custom and practice." ¶C3.6.

(2) The statute providing for retroactive pay, 5 U.S.C. 5344, is only applicable to U.S. citizens and "cannot be used as the authority for retroactive adjustments for foreign national employees." ¶C3.6.

(3) See page 18 for decisions on retroactive pay.

E. **Base Closures and Severance Pay for Foreign National Employees**.

1. The Secretary of Defense is required to have guidelines for the manner in which reductions in the number of civilian positions in DOD are carried out during a fiscal year. 10 U.S.C. 1597(a) & (b). The guidelines shall include positions for reviewing civilian procedures in the following order:

    (1) Positions filled by foreign national employees overseas;

    (2) All other positions filled by civilian employees overseas;

    (3) Overhead, indirect, and administrative positions in headquarters or field operating agencies in the United States;

    (4) Direct operating or production positions in the United States.

    10 U.S.C. 1597(b).

2. The Treasury has an account "known as the 'Foreign National Employees Separation Pay Account, Defense'. The account shall be used for the accumulation of funds to finance ... separation pay for foreign nationals ..." who are "employed by the Department of Defense, and foreign nationals employed by a foreign government for the Department of Defense" where separation pay is provided for in a contract, treaty, or memorandum of understanding with a foreign nation. 10 U.S.C. 1581(a), (e).

3. Severance pay is not available however, "if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States military facility in that country at the request of the government of that country." 10 U.S.C. 1592.

V. ADMINISTRATION OF HOST NATIONAL EMPLOYMENT IN EUROPE.

A. **Joint Personnel Committees**. The Combatant Command Commander shall establish joint personnel committees with DOD Component representation as applicable to the situation. The committees may be established on an area or country basis. Consideration will be given to participation by other parties such as other government agencies or allied forces. DOD 1400.25-M "DOD Civilian Personnel Manual" SC 1231.4.5 (USD(P&R) December 1996).

B. **SECNAVINST 5402.28A** "Delegation of Authority for Determining Compensation and Conditions of Employment of Non-U.S. Citizen Employees in Overseas Areas" (OP-141C3 July 27, 1984). Implements DOD instructions on foreign-national pay. Provides the delegation of authority from SECNAV through CNO to the Commander U.S. Naval Forces Europe with respect to compensation and other terms and conditions of employment for foreign nationals in appropriated and non-appropriated fund Navy positions. ¶ 4a.

1. Requires that joint personnel committees with Service Component Commander (i.e., Army and Air Force) representation as applicable (i.e., if the service has employed foreign national personnel in a country). ¶ 5b.

2. Provides that NAVEUR representatives "will act as an agent of the Secretary of the Navy and are empowered to act for the Department on matters before the joint committee." ¶ 5b.

3. NAVEUR will ensure representation of interests of both appropriated and nonappropriated fund activities on the Joint Committee. ¶ 5b.

4. If the Joint Committees (e.g., the Joint Civilian Personnel Committee (JCPC) - Italy) cannot establish a uniform position with respect to wages and other terms and conditions of employment then:

   - "Unresolved differences in **compensation** and other terms and conditions of employment" will be referred to the Unified Commander, i.e., to EUCOM. ¶ 5d.

   - Matters having **significant budgetary or legal implications, major policy issues or impacts on manpower ceilings** may be referred to the Assistant Secretary of Defense (Manpower, Installations and Logistics) or the Secretary of the Navy, as appropriate. ¶ 5d.

C. **U.S. European Command (EUCOM) & Tri-Component Instructions**.

1. EUCOM Dir 30-2 "Personnel - Coordination of Policy Development, U.S. Civilian Personnel" (July 24, 1995). The purpose of the instruction is to ensure satisfactory operation of civilian personnel programs and polices and to preclude conflicts among the services. Requires 30-days advance coordination among the services and EUCOM when a civilian personnel policy has a "potential for significant impact on the theater with counter-part component commanders." ¶ 7.b.(1).

2. EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" (July 6, 1999). Describes the policies and procedures for organizing and operation of Joint Civilian Personnel Committees (JCPC, previously CPCCs) and the EUCOM Civilian Personnel Committee (ECPC).

    a. Proposed changes to U.S. laws or regulations affecting operating procedures within the EUCOM area of responsibility should be routed through the EUCOM Civilian Personnel Committee (ECPC). ¶¶ 7.b., 8.b.

    b. Unless DOD has approved an alternative method, wage and benefit surveys will be used to determine prevailing wage rates and compensation schedules. ¶8.a.(e).

    c. Responsible Coordination Commanders, ¶ 9.b:

        (1) U.S. Army Europe (USAREUR) is responsible for coordination in Germany, Belgium, Luxembourg and the Netherlands.

        (2) U.S. Navy Europe (NAVEUR) is responsible for Greece, Italy, Spain, and direct hire foreign nationals in the UK.

        (3) U.S. Air Forces Europe (USAFE) is responsible for Denmark, Norway, Turkey, and indirect hire foreign nationals in the UK.

    d. EUCOM ECJ1 (Personnel) will:

        (1) In conjunction with service components, represent U.S. Forces in formal negotiations with host nations, ¶9.c(3).

        (2) Establish JCPCs in countries as required and monitor as necessary. ¶9.c(4).

    e. Responsible Component (Coordination) Commanders shall:

        (1) Be the principal point of contact on joint service matters on labor policy with appropriate representatives of the host governments, CINCEUR, CINCEUR contact officers, and U.S. Embassies. ¶9.d.(1).

(2) Inform CINCEUR, CINCEUR contact officers, U.S. Embassy, other affected component commanders, and host nation agencies, when appropriate, in advance of matters which may affect U.S. - host nation country relations because of their political or economic impact, such as RIFs, and strikes. ¶9.d(2).

(3) For each country they are responsible for, appoint a representative to serve as the JCPC Chair (normally the Director of Civilian Personnel). ¶9.d(3).

(4) Afford full consideration to participation of other parties such as other allied forces, U.S. government agencies, and Exchanges. ¶9.d(7).

f. Joint Civilian Personnel Committees (JCPC). "The JCPC will serve as a medium through which the responsible commander will discharge his/her responsibilities for LN [host national] personnel in the country concerned." App B, ¶ B-4a.

(1) Among other duties the JCPC will:

- Refer to CINCEUR for guidance or resolution on those matters on which the components cannot agree. App B, ¶ B-4b(3).

- Advise CINCEUR and component commanders of the results of any discussion furthering JCPC business or actions. App B, ¶ B-4b(4).

(2) Each component command (Army, Navy, Air Force) gets a voting member when they employ foreign nationals in that country. The chair is the responsible commander's representative. App. B, ¶ B-3a. The COMUSNAVEUR Force Civilian Personnel Director chairs JCPC-Italy.

(3) EUCOM's Civilian Personnel Advisor is a non-voting representative while the Exchanges are non-voting associate members. App B, ¶¶ B-3a, B-3b.

(4) Other DOD activities may attend meetings as observers as deemed appropriate by the JCPC. App. B ¶ B-3.c.

(5) JCPC may establish the following subcommittees. Each voting member will have a representative on the JCPC and

representatives of the Exchanges will be invited to attend. App. B. ¶B-3d. For example, in Italy:

- Wage & Classification Subcommittee. JCPC-Italy established this subcommittee which is chaired by the Navy (Naples).

- Employment-Management Relations. JCPC-Italy established this subcommittee as Labor Relations and Employment Practices. It is chaired by the Army (SETAF).

- Employment and Personnel Systems. JCPC-Italy opted not to establish this subcommittee.

3. Italy - Joint Civilian Personnel Manual for Administration and Management of Non-U.S. Citizens in Italy (JCPM), USAREUR Reg 690-4/ CINCUSNAVEURINST 12250.1C/ USAFER 40-14 (11 July 1986). Although still on the list of active instructions, it is out of date containing the 1986 Conditions of Employment with the Italian unions, with a few other items added. One of these was coordination of notice of litigation in foreign courts with updates to the civilian personnel directors of the three services.

   a. Provides amplifying comments and guidance which will be followed by commands in situations where it is necessary to apply or interpret the Conditions of Employment (COE, the contract with host nation unions). Applies to both appropriated fund and non-appropriated fund (NAF) host national employees.

   b. It has not been revised to account for the new COE. Current JCPC trend is to scrap the JCPM in favor of a more user-friendly working manual.

   c. In some instances it is plain wrong (e.g., Chapter 59 suspensions).

D. **COMUSNAVEUR INST 5450.15F** "Functions and Tasks of the Commander, U.S. Naval Forces Europe (CNE) Force Civilian Personnel Director; Director, Civilian Personnel Programs; And Command Deputy Equal Employment Opportunity Officer" (CNE 016 July 21, 2003). The CNE Force Civilian Personnel Director:

1. Represents DON and COMUSNAVEUR on JCPCs and Chairs the JCPC for Greece, Spain, Italy, Iceland and UK. ¶ 5.e.

2. Conducts annual wage surveys in host-nations. ¶ 5f.

3. Coordinates with appropriate offices (e.g., U.S. Embassy Staffs, USEUCOM, ODC, US Sending State Offices), those host national issue that may result in a significant change in working conditions or pay, or have a significant budget impact, or may result in major or prolonged labor unrest. ¶ 5h.

VI. HOST NATIONAL EMPLOYEES & U.S. CIVIL SERVICE ADMINISTRATIVE PROCEDURES.

A. **Host National Employees Cannot File EEO Complaints**. The EEOC complaint process "does not apply to … Aliens employed in positions, or who apply for positions, located outside the limits of the United States." 29 C.F.R. 1614.103(d)(4).

B. **Host National Employees Do Not Have MSPB Appeal Rights**. 5 U.S.C. 7511(b)(9) *referencing* 5102(c)(11) (excludes from the definition of employees with MSPB appeal rights, aliens or noncitizens of the United States who occupy positions outside the United States). Army hired appellant as a local national (LN) employee in Italy and she received an excepted service appointment. She later became a naturalized U.S. citizen and the Army converted her to GS status with an overseas limited appointment. When it was subsequently determined she was ordinarily resident in Italy at the time of her GS conversion, her appointment was terminated. She contested her initial conversion from LN to GS and her subsequent termination in an MSPB appeal. The MSPB determined that an overseas limited appointment does not confer competitive status and it has no jurisdiction to hear the appeal of a non-preference eligible in the excepted service. *Meyers v. Army*, 35 M.S.P.R. 417, 419 (1987).

C. **Host National Employees Do Not Have Recourse to the FLRA**. An "alien or noncitizen of the United States who occupies a position outside the United State" is excluded from the definition of "employee" with respect to Chapter 71-Labor-Management Relations of the Civil Service Reform Act of 1978. 5 U.S.C. 7103(a)(2)(i). This removes labor management relations with foreign national employees from the Federal Labor Relations Authority (FLRA) and the federal civil service labor-management grievance/arbitration process.

Limitations on the FLRA with respect to U.S. civil service labor relations are discussed at page 47.

VII. ADMINISTRATIVE STRUCTURE FOR OVERSEAS EMPLOYMENT OF U.S. CIVIL SERVANTS.

A. DOD Policy For Overseas Civil Service Employment.

1. DOD Dir 1400.6 "DoD Civilian Employees In Overseas Areas" (ASD(MRA&L) Feb. 15, 1980). Establishes basic policy for overseas employment.

3. POLICY

3.1. " [E]ach Military Service commander shall employ a civilian manpower mix -- U.S. citizens and local nationals -- that blends financial prudence, conformance with host country agreements or treaties, availability of qualified local national personnel, and the desired low-key presence of the U.S. Government abroad."

3.2. "Unless precluded by treaties or other agreements that give preferential treatment to local nationals, preference shall be given to dependents of military and civilian personnel as provided in DoD Instruction 1400.23 (reference (d)). Personnel transferred from or recruited in the United States shall be limited to key personnel, those regarded as essential for security reasons, or those possessing skills that are not available locally."

3.3. "It is the policy of the Department of Defense to encourage its more capable employees in the Continental United States to accept overseas assignments as a part of their career development. In order to promote the efficiency of worldwide operations, employment of U.S. citizens in foreign areas shall generally be limited to 5 years, as provided in DoD Instruction 1404.8 (reference (e)). Rights to return to a position in the Continental United States shall be given to DoD career and career-conditional employees who accept assignments overseas with the Department of Defense."

3.8. "The Department of Defense recognizes that to obtain and retain the services of DoD civilian employees of the caliber required in its overseas areas, it may be necessary to provide pay differentials and allowances over and above base salary. Therefore, within the provisions of applicable laws and regulations (DoD Instruction

1418.1, reference (f)), DoD civilian employees serving in overseas areas shall be granted differentials and allowances that are appropriate to their places of employment and their employment conditions."

2. To reduce the need to import U.S. civil servants into foreign countries, foreign nationals shall be employed as extensively as possible by the U.S. Forces consistent with any agreement with the host nation and DOD family member hiring policies. DOD 1400.25-M, "DOD Civilian Personnel Manual" SC 1231.4.1.2 (USD(P&R) December 1996).

B. **Duration of Tour**.

1. Minimum Tour. The minimum duration of overseas tours is driven by the statutory requirements for a government funded travel and transportation costs (e.g., the household goods move (HHG)). With respect to the agency paying travel and transportation expenses to return the employee from OCONUS, the employee must have served for a "minimum period" which will be "not less than one nor more than 3 years" to be established in advance by the person acting as "head of agency." 5 U.S.C. 5722(a)(2), (c)(2).

2. Standard Tours. "Standard tours of duty are 36 months under initial, and 24 months under renewal, agreements negotiated with employees assigned OCONUS." JTR C4005-C.1.a. Exceptions to the standard tour are listed in JTR C Appendix Q. "[T]ours established by ASD(FM&P) for DoD civilian employees in OCONUS localities are uniform within each area." JTR C4005-C.1.a.

   a. There is an extensive discussion in JTR C4005 defining tours of duty, administrative extensions or reductions of tours, credit for prior OCONUS service, reassignments in the same or different OCONUS area. The date a tour begins is defined in JTR C4006.

   b. The authority to extend the tour beyond the first tour up to a total of 5 years is delegated to the heads of overseas activities. OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶ 5-4b.(1).

   c. "A decision on whether or not to extend an assignment should be made no sooner than 6 nor no later than 3 months before the scheduled tour expiration date. Employees should be notified in writing of a decision to not extend an assignment and advised of

return options available upon completion of the assignment ... Rotation will be accomplished through exercise of return rights, or if eligible, through the PPP." OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-5a.

d. Acceptable reasons for release from a period of service is covered in JTR C4009.

e. Financial penalties for failing to satisfy the TA service requirement is covered in JTR C4352.

3. 5-Year Rule. It is the declared policy of Congress "to facilitate the interchange of civilian employees of the Defense Establishment between posts of duty in the United States and posts of duty outside the United States through the establishment and operation of programs for the rotation" of employees "consistent with" the mission and "sound principles of administration." 5 U.S.C. 1586(a). This statute constitutes the policy basis for the 5-year rule.

a. SECDEF is responsible for the program for DOD employees. The respective Secretary of each military department is responsible for the program for employees of that department. 10 U.S.C. 1586(b). Notwithstanding this provision, DOD generally exempts its employees from the 5-year rule and DOD regulations, in effect, control the program for all military departments.

b. By its terms, the statute applies to career-conditional (generally employees who have served less than three years) or career employees (generally employees who have served over three years) in the competitive civil service. 5 U.S.C. 1586(b)(1). Thus, the 5-year rule does not apply to employees in non-appropriated fund positions with the Exchange.

(1) DOD Instruction. The implementing instruction for the 5-year rule is the DOD Civilian Personnel Manual Subchapter 301.4 (1988). Under the 1988 version, local military commanders have the authority to grant extensions. Interim Guidance was issued by the DOD Deputy Assistant Secretary of Defense (Civilian Personnel Policy) relating that tour extensions should only be granted in extremely rare situations. Subchapter 301.4 has been pending revision and republication since at least 1997 as Subchapter 1230, "DOD Civilian Personnel Manual" 1400.25-M (USD(P&R) December 1996). As of February 2005, the revision had not been published as final.

c. Navy Instruction. OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-1.

(1) The following classes of employees are exempt from the 5-year rotation policy

(a) Employees in the excepted service;

(b) Employees serving continuously in a foreign areas since before implementation of the 5-year rotation policy on June 1, 1988. (Note: the instruction later relates that employees who were employed in a foreign area on April 1, 1986, and who are not serving under an agreement providing for their return to the U.S., shall not be required to return against their wishes. *Id.*, at ¶ 5-9 "Return Placement of Overseas Employees Through the Priority Placement Program."

(c) Employees in overseas-unique positions. This applies to incumbents of positions "which require (i.e., almost daily contact with government officials of the host nation and a detailed current knowledge of the culture, mores, laws, customs or government processes of the host nation which cannot be acquired outside the host nation."

(i) Such contacts and knowledge must be the reason the position was established.

(ii) The PD must reflect such duties.

(d) Employees who are dependents of military or DOD civilian personnel sponsors stationed in the area. The length of the dependent's tour is tied to the sponsor's tour.

(e) SES employees.

OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶ 5-3.a *referencing the* DOD Civilian Personnel Manual 301.

(2) These individuals "may upon approval and only at the end of the 5 years of foreign service forfeit any return rights and remain in the foreign area indefinitely. OCPM INST 12301.2

"Federal Personnel Manual (FPM) - Navy Supplement" ¶5-3b *referencing the* DOD Civilian Personnel Manual 301. Note: return rights are to their previous position back in the States - remaining over 5 years does not entail a forfeiture of the TA.

(a) Major commands are delegated the authority to approve return rights forfeiture which may be further delegated. *Id.*, at ¶ 5-3.b(1).

(b) Upon approval to forfeit return rights, employees will sign a new TA. *Id.*, at ¶ 5-3.b(2).

(c) The instruction does not address employees who do not have return rights.

d. Navy Theater Instruction. The Navy's theater instruction on the subject is COMUSNAVEUR INST 12301.2F "Tour Rotation of U.S. Employees Overseas" (CNE 016 Jun 10, 2003).

e. A challenge to the 5-year rule made by overseas employees was rejected by the D.C. District Court. *OCONUS Employee Rotation Action Group (ODERAG) v. Cohen*, 140 F.Supp.2d 37, 2001 W.L. 424920, 2001 U.S. Dist. LEXIS 8915 (D.D.C. March 27, 2001).

4. Extension of Tour Beyond 5 Years. DON policy is that employees should serve their initial 5-year tour "and should plan their careers to return upon completion of their assignment. Tour extensions [beyond 5 years overseas] will be at the request of management with the concurrence of the employee." OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶ 5-1. The authority to grant extensions beyond 5 years is delegated to the Major Commands which may be redelegated. OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶ 5-4b(2).

C. **Membership in the U.S. Civilian Component**. The basic definition of membership in the U.S. Civilian Component is in the NATO SOFA art I.1(b).

1. Definition Part 1: "'civilian component' means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party ..." NATO SOFA art I.1(b). In other words, the DOD U.S. civil service (including appropriated fund, non-appropriated fund, and Exchange employees) comprise the "U.S.

civilian component." Host national employees under Article IX.4 of the NATO SOFA constitute the other category of civilian employment.

a. "in the employ of an armed service," thus the SOFA does not apply to U.S. civil servants from other federal agencies in Italy, e.g., the U.S. Embassy staff.

b. "accompanying the force." European nations tend to view this as an active part of the definition. This issue crops up when the U.S. Forces want to hire an American, not otherwise affiliated with the force already in the host nation, into the civilian component. Under the European view, a local U.S. hire shouldn't be a member of the civilian component because they weren't "accompanying the force" when they arrived in the host nation. This view is strengthened by SOFA article IX .4 which provides that "[l]ocal civilian labour requirements" will be satisfied by "local," i.e., host nation, civilian labor. The U.S. Forces view is that "accompanying the force" is an end-result; if the candidates meets all the other criteria (isn't a citizen of the host nation or ordinarily resident), they can be hired into the U.S. civilian component and thereby "accompany the force." Lazareff found the "requirement according to which the civilian must 'accompany a Force' [to be] too vague to represent a specific condition." Serge Lazareff, *Status of Military Forces Under Current International Law*, Second Part, Chapt. II §2.2 (1971).

2. Definition Part 2 - Those who are prohibited from membership in the U.S. civilian component:

a. The following persons are prohibited from being a member of the U.S. civilian component in NATO SOFA art I.1(b):

(1) "Nationals of" the host nation, e.g., Italian nationals, cannot be hired into U.S. positions in Italy,

(2) Persons who are "ordinarily resident" in the host nation. For example, we cannot hire as U.S. employees, U.S. citizens who already ordinarily reside in Italy.

(3) We cannot hire "nationals of any state which is not a party to the North-Atlantic Treaty." Typically, this restriction impacts Asian spouses of U.S. Forces personnel.

(a) DECA and base commanders allow dependents who are citizens of non-NATO countries to be commissary

baggers. The theory is that these individuals are not employees of the base; rather the CO has given them a "license" to bag groceries.

(4) Nor can "stateless persons" be hired into the U.S. civilian component. This provision may seem an anachronism now, but as late as 1960, there were still 100,000 World War II refugees living in camps in Europe. R. Davies, *In Praise of Ronald Searle*, The Independent on Sunday - Talk of the Town (U.K. Magazine), Sept. 21, 2003, at 20, col. 1.

b. These restrictions apply to appropriated fund and non-appropriated fund positions.

3. Issues Regarding the "Nationals of" Restriction. Poorly and somewhat inaccurately stated, "nationals of" a country is an expanded concept of citizenship - e.g., nationals of the United States would include citizens of Puerto Rico even though they are not U.S. citizens. *See* Restatement (Third) of Foreign Relations, §§211h, 212 (1986).

a. U.S. citizenship requirements, see below, would limit nationals of NATO countries (other than nationals of the host nation), to non-appropriated fund positions in the U.S. civilian component.

b. Dual National (DN) Employees. These are U.S. civil servants (appropriated and non-appropriated fund employees) who hold dual U.S. and host nation citizenship. By definition in the NATO SOFA, "nationals of" the host nation cannot be members of the U.S. civilian component. European nations generally regard dual national employees as ineligible for membership in the U.S. civilian component.

4. The Ordinarily Resident Restriction. There is no definition of "ordinarily resident" in the SOFA and typically, no bilateral definition either. The U.S. Forces use general U.S. concepts of domicile to determine if an applicant is ordinarily resident, e.g., in Italy the "Tri-Component Instruction" CINCUSNAVEURINST 5840.2D, USAEUR Reg 550-32, USAFE Inst 36-101, Section VI (April 4, 2001).

a. Criteria in the Tri-Component Instruction.

(1) An individual is ordinarily resident if he/she physically resides in Italy for more than one year without affiliation with the U.S. Forces. ¶21.b.

(2) A person who has lived in Italy for less than one year without affiliation with U.S. Forces can become ordinarily resident if the individual: ¶21.c.

- Has remained in Italy on a family cohesion permit to stay (*permesso di soggiorno per famiglia*).

- Registers as a *residente* in the Municipal Register (*Ufficio Anagrafe*) of the town where they reside;

- Takes affirmative steps to avail themselves of permanent resident benefits including, but not limited to, voting or registering to vote in Italy, applying for unemployment benefits, obtaining a work booklet (*libretto di lavoro*), obtaining a *libretto sanitario* for the Italian health care system, obtaining a work permit (*permesso di soggiorno per lavoro suborinato* or *permesso di soggiorno per lavoro autonomo*) unless the permit was issued for employment with the US Forces in Italy, and paying or having a legal obligation to pay Italian income taxes or property taxes because of residency.

b. US Income Tax Exclusion. In nearly all circumstances, the criteria for filing for Foreign Earned Income and Housing Exclusion - Deduction from U.S. income taxes would be the equivalent of stating the person is ordinarily resident in the host nation. See IRS Publication 54 "Tax Guide for U.S. Citizens and Resident Aliens Abroad."

c. CINCUSNAVEUR INST 12301.3B "Ineligibility of 'Ordinarily Resident' Individuals for U.S. Civilian Component Employment in NATO Host Nations" (CNE 016 Sept. 2, 1998).

d. CINCUSNAVEUR INST 12301.4 "Civilian Component Eligibility in Greece" (CNE 016 May 13, 1997).

5. Minimum Work Week Restrictions. In order to be a "regular" NAF employee the individual has to have a regular schedule of not less than 20 hours a week. DoD 1400.25-M, "DOD Civilian Personnel Manual" SC1403.3.1.1 (USD/P&R December 1996). This status is sometimes used as benchmark for membership in the U.S. civilian component (with attendant ID card privileges). E.g., CINCUSNAVEUR INST 12301.4

"Civilian Component Eligibility in Greece" ¶5a (CNE 016 May 13, 1997).

6. Reasons for the SOFA Restrictions. It is a matter of host nation sovereignty and taxes. Members of the U.S. civilian component are employees of the United States and pay taxes to the United States - not to the host nation. The European nations didn't want their citizens to escape taxation by being able to join the U.S. civilian component. Neither did they want Americans who were already residing in their country to be able to escape local taxes by joining the U.S. civilian component.

7. Required Documentation. Members of the civilian component must have the appropriate identifying documentation: if required by the host nation, an appropriate visa for entry into the country; a U.S. official (purple cover) or a "no fee" passport identifying the person as a member of the civilian component (regular blue "tourist" passport with the "SOFA Stamp"), and, if required by the host nation, a permit to stay (i.e., a host nation "green card").

    a. Military members, but not members of the civilian component or dependents, are exempt from passport and visa requirements. NATO SOFA, art. III.1. Visas are a permission to enter a country. Individuals already in a foreign country cannot get a visa to enter that country. Visas are typically available from the host nation's embassy or consulates.

8. Essential personnel of the USO, Schools, Post Exchanges, Commissaries, Credit Unions, and Red Cross are typically treated as equivalent to members of the U.S. civilian component in bilateral agreements between the U.S. and the host nation. Technical representatives of U.S. Forces contractors are also typically addressed in bilateral agreements. Not all contractor personnel are entitled to "logistical support," i.e., ID card privileges, just the "tech reps," it is a term of art. The citizenship and residency restrictions that apply to members of the U.S. civilian component are also applied to essential personnel and tech reps.

D. **U.S. Statutes Generally Affecting Overseas Employment of U.S. Civil Servants**.

1. U.S. Citizenship Requirement for the Competitive Service. The requirement to be a U.S. citizen in order to be a U.S. civil servant in the competitive service is not required by statute but by Presidential Executive Order and implementing regulations. Executive Order (E.O.) 11935, dated September 2, 1976, provided that no person shall be admitted to competitive examination or given any appointment in the competitive service unless such person is a citizen or national of the United States. *Codified at* 5 C.F.R. 7.4.

    a. An exception was created on January 18, 2001, by E.O. 13197 allowing OPM to "as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments." 5 C.F.R. § 7.3.

2. Citizenship Requirements for in the Non-Competitive Service. Non-competitive service employees are concentrated in non-appropriated fund positions (e.g., Exchange and MWR operations). The "DOD Civilian Personnel Manual" subchapter dealing with Nonappropriated Fund Personnel Management generally allows the hiring of U.S. citizens, and non-U.S. citizens in the United States who are a bona fide residents and have proper documentation from INS to work in the U.S. DOD 1400.25-M, SC1403.4.2.3 (USD(P&R) December 1996).

    a. As far as allowing bona fide residents with U.S. work permits to be employed in the U.S., DOD is following the Immigration Reform and Control Act of 1986 (IRCA), PL 99-603, November 6, 1986.

    b. In discussing the hiring of non-citizens, the DOD Civilian Personnel Manual references the OPM Operating Manual discussion of the Federal Wage System (FWS, "blue collar" paid by the hour) for non-appropriated fund employment. Federal Wage System, Operating Manual, The Federal Wage System Subchapter S1. "Basic Authorities" ¶ S1-5 (OPM 1996 Update). The reference should not be understood to limit the hiring of foreign nationals in the U.S. to blue collar positions. OPM simply discussed the issue in their FWS Operating Manual and DOD referenced it. There is nothing in IRCA that limits foreign nationals in the U.S. to blue collar positions.

c. Note that citizens from non-NATO countries cannot be hired into the U.S. civilian component, even if they are dependents of military members or civilian employees, and even if the dependent has a U.S. work permit. This is because the NATO SOFA limits the visiting force, e.g., the U.S. Forces, civilian component to "nationals of any State which is not a Party to the North Atlantic Treaty ... ." NATO SOFA art I.1(b).

3. U.S. Citizens Cannot Be Hired Host National Employees. See discussion at page 11.

4. Family Preference. A hiring preference is available for family members of government employees assigned abroad at their post of residence. "The fact that an applicant for employment ... is a family member of a Government employee assigned abroad shall be considered an affirmative factor in employing such person." 22 U.S.C. 3951(b). Although written for the Department of State, such programs may also be developed by other agencies with employment abroad. 22 U.S.C. 3968(b). DOD Inst 1400.23 (ASD(FM&P May 12, 1989) (DOD is presently rewriting regulations on this program to be published in the "DOD Civilian Personnel Manual" DOD 1400.25-M Subchapter 1232 (USD(P&R December 1996) .) U.S. Forces operate a family preference in hiring for appropriated and nonappropriated fund positions.

5. Military Spouse Preference. The following preferences are authorized for military spouses when the civilian position is located in the same geographic area where the military spouse is assigned.

   a. The Secretary of Defense is authorized to issue regulations to provide a hiring preference for military spouses for any DOD civilian position "if the [military] spouses is among persons determined to be best qualified for the position." 10 U.S.C. 1784(b)(2). Instructions on this provision are currently being rewritten for eventual publication in DOD Civilian Personnel Manual 1400.25-M Subchapter 315.

   b. The President is authorized to order a hiring preference for nonappropriated fund activity positions grades UA-8 and below and equivalent grades. 10 U.S.C. 1784(a)(2). The President subsequently issued Executive Order 12568, 51 Fed. Reg. 35497 (October 2, 1986), 10 U.S.C.A. 1784 note (West).

   c. The President can authorize positions outside the United States to be removed from the competitive service so that military spouses can be

appointed to positions in the excepted service. 10 U.S.C. 1784(a)(1). It does not appear an Executive order has been issued to effect this provision.

d. Military spouse preference does not include a preference in hiring over an applicant with a veterans preference. 10 U.S.C. 1784(c). This does not preclude providing a military spouse preference where the military spouse also has veterans preference.

E. **Labor & Employee Rights Laws Overseas**.

1. Laws Prohibiting Employment Discrimination. Individuals blocked from membership in the U.S. Civilian component by the SOFA's citizenship or residency requirements will typically challenge these requirements under one or more of the following laws.

a. Title VII. National origin discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, and the implementing EEOC regulations at 29 C.F.R. part 1614.

b. Prohibition of Employment Discrimination Against US Citizens or Armed Forces Dependents. "Unless prohibited by treaty, no person shall be discriminated against ... in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term 'facility or installation' ... shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store." 5 U.S.C. 7201 note (Pub.L. 92-129, Title I, § 106 (Sept. 28, 1971)).

(1) "Unless prohibited by treaty" exception takes care of almost all objections to hiring actions brought under this provision.

(2) Note, we cannot hire dependents who are citizens of non-NATO countries into the US civilian component. NATO SOFA art I.1(b).

(3) This law is not included in the list of statutes that the EEOC has jurisdiction over. 29 C.F.R. 1614.103. In order to raise a violation of this statute, a person would have to file an internal

agency grievance or a complaint with the U.S. Office of Special Counsel.

c. Veterans Preference in Hiring & the Uniformed Services and Reemployment Rights Act (USERRA). Former military members generally enjoy a preference in hiring into the U.S. civil service. 5 U.S.C. 2108, 3309. Further, USERRA prohibits employment discrimination against current or former members (or even those just thinking of going in the military) of the military or military reserves. 38 U.S.C. 4311. The typical allegation is that application of the ordinarily resident criteria in the SOFA violates these laws.

2. Why U.S. Discrimination Laws Don't Apply to the Citizenship & Residency Requirements For Membership In the U.S. Civilian Component Under the NATO SOFA.

a. International Agreements Take Precedence Over U.S. Domestic Law. Here the NATO SOFA is not just an international agreement but a formal treaty ratified by the Senate pursuant to Art. II, § 2, cl 2 of the Constitution. Accordingly, provisions of the NATO SOFA take precedence over Title VII, §6 of P.L. 92-129, veterans preference, and USERRA.

b. Claims of national origin discrimination are also inapplicable as the SOFA provides for employment distinctions on the basis of citizenship, and citizenship is not covered by the prohibition of national origin discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, or under the EEOC's regulations at 29 C.F.R. 1614.103(a).

c. The prohibition of employment discrimination by DOD against U.S. citizens does not apply where a treaty requires such distinctions. The provisions of §6 of P.L. 92-129 begins with the phrase, "Unless prohibited by treaty ... ." Noting the awkward wording and use of a double negative, the Supreme Court has suggested that "replacing the phrase 'unless prohibited by' with either the words 'unless permitted by' or 'unless provided by' would convey more precisely the meaning of the statute." *Weinberger v. Rossi*, 102 S.Ct. 1510 (1982). Since the SOFA requires distinctions on citizenship, the section 6 prohibitions do not apply.

d. Allegations of violation of veterans preference or USERRA also fail because the individual has to be otherwise qualified for the position. If application of the SOFA citizenship or residency requirements

make them unqualified for employment, then neither veterans preference nor the provisions of USERRA apply.

3. Relevant Court & Administrative Decisions on U.S. Discrimination Laws.

   a. International agreements constitute an exemption to the provisions of domestic law. *Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510 (1982) (interpreting §6, P.L. 92-129, codified at 5 U.S.C. 7201 note). "Treaty," as used in §6, includes executive agreements and is not limited to those international agreements concluded by the president with the advice and consent to the Senate pursuant to Art II, § 2, cl. 2 of the Constitution.

   b. "Aliens are protected from illegal discrimination under [Title VII], but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86, 95 (1973). In *Espinoza*, the Court recognized that Congress required civil servants to be U.S. citizens (including the EEOC attorneys who prosecuted the case) and held that it was not national origin discrimination for a company to require its employees to be citizens. Accordingly, any EEO complaint alleging national origin discrimination for application of the citizenship requirements under the NATO SOFA should be dismissed for failure to state a claim pursuant to 29 C.F.R. 1614.107(a).

      (1) Farah made clothing at a plant in Texas. It had a policy against hiring Mexican citizens. Nevertheless, the workforce was over 90% Mexican-American (individuals with Mexican heritage or national origin, but not Mexican citizenship). Plaintiff was denied employment because of her Mexican citizenship and, with the support of the EEOC, she sued Farah alleging national origin discrimination in violation with Title VII.

      (2) Justice Marshall, who wrote the decision, recognized "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin," *id.*, at 92, and gave examples. But he concluded it "is equally clear ... that these principles lend no support to petitioners in this case." *Id.*, at 92. Justice Marshall explained that there "is no indication in the record that Farah's policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin. It is conceded that Farah accepts employees of Mexican origin,

provided the individual concerned has become an American citizen." *Id.*, at 92-93. Justice Marshall concluded, the "plain fact of the matter is that Farah does not discriminate against persons of Mexican national origin with respect to employment in the job Mrs. Espinoza sought. She was denied employment, not because of the country of her origin, but because she had not yet achieved United States citizenship." *Espinoza v. Farah*., at 93.

c. The leading Equal Employment Opportunity Commission decision on dismissal of national origin discrimination complaints relating to application of the NATO SOFA is *Ashburn v. West, Secretary of the Army*, 01932623 (EEOC 1994). The *Ashburn* decision dealt with the ability of a U.S. citizen who was ordinarily resident in Germany, working as a German national, to contest his removal through the EEO complaint process. (Note that Americans cannot be hired as host national employees in other NATO countries.)

(1) Mr. Ashburn, an American ordinarily resident in Berlin, had been employed as a local national when he was fired for refusal to obey an order regarding a duty assignment. Ashburn sued in German labor court and filed an EEO complaint. The Army dismissed the EEO complaint for failure to state a claim under Title VII.

(2) In its decisions sustaining the dismissal, the Commission recounted the provisions of the NATO SOFA and the treaty supplement applicable to Germany. "The treaties governing employment of non-military personnel by U.S. forces stationed in Germany," the Commission wrote, "distinguish between civilian personnel, who are subject to the laws of the country providing the armed forces (the 'sending state'), and local nationals, who are subject to the laws of the country in which the forces are located." *Ashburn v. West*. The Commission accurately related that, "Article I, ¶1(b) of the NATO SOFA treaty provides that those who are ordinarily resident in the receiving state cannot be employed as civilian personnel." *Ashburn v. West, citing* NATO SOFA 4 U.S.T. at 1794.

(3) The Commission concluded its analysis of whether Mr. Ashburn stated a national origin claim by reviewing treaty provisions covering the working conditions for local nationals. The Commission concluded that Title VII did not apply to Mr.

Ashburn's removal and sustained the dismissal of his EEO complaint.

(d) In *Ashburn* the Commission abandoned the simple analysis found in *Cole v. Stone* and *Chambers v. Dept. of the Air Force* - that a contested personnel action involving the SOFA, accompanied by an allegation of national origin discrimination, necessarily stated a claim under Title VII. *Cole v. Stone, Secretary of the Army*, 05890142 (EEOC 1989); *Chambers v. Dept. of the Air Force*, 01832403 (EEOC/ORA 1984).

(1) Mr. Cole was denied employment as a U.S. civil servant in Germany because he ordinarily resided in Germany. The Army dismissed his EEO complaint. The Commission's analysis reversing the dismissal took less than two sentences. "[A]ppellant is alleging that he is an aggrieved applicant for employment in that he was denied a position with the agency and he alleges that he has been discriminated against on the basis of his national origin, American. This is all that is necessary for appellant to state a claim ... ."

(2) Similarly, Ms. Chambers was denied employment as a U.S. civil servant in Britain because she was a dual national. The Air Force dismissed her national origin (British) EEO complaint because the contested personnel action was taken on the basis of her citizenship. The Commission's Office of Review and Appeals reversed finding the agency's decision "improper" as a "finding on the merits of her allegations."

(3) In contrast, the Commission in *Ashburn* looked to the substance of complainant's allegation, not to make a decision on the merits, but to determine if Title VII covered the dispute. The 1994 decision in *Ashburn* presaged *Cobb v. Rubin* where the Commission held its Office of Federal Operations "erred when it held that the appellant's complaint stated a harassment claim without addressing whether the appellant's allegations where sufficient to state a hostile or abusive working environment." *Cobb v. Rubin, Secretary of Treasury*, 05970077 (EEOC 1997).

4. Restriction on FLRA Jurisdiction Overseas. Congress authorized the President to "issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security." 5 U.S.C.

7103 (b) (2). Executive Order 12391 partially suspends several labor-management relations provisions with respect to overseas activities of the Dept. of Defense. 5 U.S.C.A. 7103 note, 47 Fed. Reg. 50457 (Nov. 4, 1982).

a. For United States citizen employees of the Department of Defense and Military Departments;

- who are employed outside the United States;

- for any matter **which substantially impairs** the implementation by the United States Forces of **any treaty or agreement**, including any minutes or understandings thereto, between the United States and the Government of the host nation;

b. The Executive Order suspends:

- FLRA's authorization to resolve issues relating to determining compelling need for agency rules or regulations, 5 U.S.C. 7105(a)(2)(D);

- FLRA's authorization to resolve issues relating to the duty to bargain in good faith, 5 U.S.C. 7105(a)(2)(E);

- FLRA's authorization to conduct hearings on unfair labor practice (ULP) complaints, 5 U.S.C. 7105(a)(2)(G);

- FLRA's authorization to resolve exceptions to arbitrator's awards, 5 U.S.C. 7105(a)(2)(H);

- the requirement to arbitrate grievances, 5 U.S.C. 7121(b)(3)(C) (since redesignated 7121(b)(1)(C));

- collective bargaining with respect to conditions of employment 5 U.S.C. 7102(2), 7114(a)(1), and the requirement to meet and negotiate in good faith, 7114(a)(4), and that it is a ULP to refuse to consult or negotiate in good faith 7116(a)(5);

- the ability of the union to appeal the to the FLRA when the agency refuses to negotiate under 7117(c).

c. And with regard to any union challenges to regulations governing the implementation by the United States Forces of any treaty or agreement, including any minutes or understandings thereto, between the United States and the Government of the host nations, the Executive Order suspends:

- the need to establish that there is a compelling need for the regulation, 5 U.S.C. 7117(b), and

- that it is a ULP for an agency to enforce any rule or regulation which is in conflict with any applicable collective bargaining agreement in effect before the date the rule or regulation was prescribed, 5 U.S.C. 7116(a)(7).

VIII. OVERSEAS PAY, ALLOWANCES - GENERAL.

A. Introduction.

1. The general context of this portion of the outline is assignments to Europe by American civil servants. This outline:

- Is focused on DOD employees with a lesser emphasis on particular coverage of spouses or other dependents. The outline does not cover SES. Nor overseas teachers, such as Department of Defense Dependent Schools (DODDS) employees, who have major variations from the rules due to the school year, and in particular, travel rules applicable to other employees.

- Is focused on DOD employees serving Foreign Outside the Continental United States (F-OCONUS) tours, not on non-foreign OCONUS (NF-OCONUS) tours in places such as Hawaii, Alaska or Puerto Rico. Tours in NF-OCONUS areas have different rules.

- Is focused on Permanent Change of Station (PCS) moves not temporary change of station (TCS) moves.

- Does not address married employed couples where each spouse has entitlements.

2. The outline does not discuss all rules applicable to payment of travel, per diem and relocation expenses - only as those rules are affected by overseas assignments.

Warning: This portion outline is a guide to overseas allowances - don't mistake it for the definitive word on overseas allowances. The regulations, especially the Joint Travel Regulation Volume 2 (JTR), are subject to change, so it is vital that the actual regulations be consulted. Further, when reading the regulations, the words used are pregnant with meaning that may not be readily apparent. Understand also that HR offices interpreting the instructions may read them differently than described here, or may have imposed additional requirements. So be sure to consult with the offices that will actually be involved in an allowance determination to understand what all the requirements are.

3. This portion of the outline structure is generally organized for how an employee would progress through an overseas assignment - the move overseas, overseas allowances, home leave, renewal agreement travel, the return from overseas, and concludes with emergency situations.

4. The outline uses the term "American civil servant" to distinguish from employees who are citizens of the overseas host country working for the U.S. Forces.

5. The statutes and regulations make a variety of distinctions between the: continental United States (CONUS) and outside the continental United States (OCONUS); the United States and the United States its possessions and territories; and foreign areas and non-foreign OCONUS areas. I have attempted to maintain those distinctions in the outline. "Overseas" is a generic term used by the outline.

6. A summary of authorized Travel & Transportation Allowances is at 41 C.F.R. Subchapter B "Relocation Allowances" Part 302-3 "Relocation Allowance by Specific Type."

7. A summary of authorized OCONUS allowances are at JTR C5010.

B. **General Observations on Allowances**.

1. The travel regulations can be viewed as divided into three parts - the underlying rules, the rules that have been added because of mindless application of the first set of rules by payment or travel officials to deny legitimate claims, and the rules that have been added because of extraordinarily greedy claims filed by employees.

2. The regulations for overseas allowances are not particularly well written or integrated with one another. What particular phrases mean is often

obscure and can change from instruction to instruction. For example, "a bona fide actual residence" with regard to a Transportation Agreement for overseas hires under JTR C4002-B.2.b(2), means your legal domicile or home of record, while "actual place of residence" with regard to the Living Quarters Allowance (LQA) for overseas hires under the Department of State Standardized Regulations (DSSR) § 031.12.a means residence or where the person is actually living. Also, the policy goals behind some of the restrictions are often obscure, e.g., an employee overseas at permanent duty station (PDS) #1 without LQA, applying for a position at PDS #2 cannot get LQA even though an applicant from CONUS could.

3. It is important for managers and employees to know and understand the allowances and limits on the allowances before the move. "Fixing" problems after the fact is often impossible. Accordingly, proceeding on the basis that common sense and "saving the government money" will get the overseas candidate their allowances is bound to end in disappointment. Selecting officials need a firm opinion from HRO on whether the candidate will qualify for the allowance in question before making the job offer. Determining when the LQA and a TA is authorized for an overseas hire is complex, involving a confusing interaction of DOD instructions, the Joint Travel Regulations, and the Department of State Standardized Regulations (DSSR).

4. Saving the government money" is **not** a guiding principle of the instructions. The rules generally flow from fiscal law which firsts asks, "What is the authority for spending the money?" Without authority (and often advanced permission) to incur the expense, it is impossible to have the expense reimbursed later. The Navy tradition of acting first (incurring the move or the expense) and asking forgiveness (and reimbursement) for resulting mistakes does not work in this arena.

5. The statutes, and especially the regulations, are geared toward a standard set of circumstances, namely, a civil servant in CONUS being hired for an overseas position and then returning to CONUS. Deviations from that model can reduce the availability of one or more allowances.

6. The major allowances/benefits for overseas employees are:

    a. Transportation Agreement (TA) where the government agrees to provide transportation for the employee, the employee's family, and their household goods to their overseas duty location and back. The TA is controlled by JTR Chapter C4000 Parts A & H.

b. Temporary Quarters Subsistance Allowance (TQSA) for temporary quarters occupied after first arrival at a PDS in a foreign area or immediately preceding final departure from that PDS. TQSA rules are in DSSR Section 120.

c. Living Quarters Allowance (LQA) where the government provides a quarters allowance. The LQA is controlled by provisions in the DOD Civilian Personnel Manual, DOD 1400.25-M, Subchapter 1250-E, and DSSR Section 031.1.

d. Post Allowance for those overseas locations with a living cost in excess of Washington, D.C.

e. Schooling for Dependents.

7. Qualifying for an overseas Post Allowance is almost automatic. But for overseas hires, qualifying for a Housing Allowance is difficult, getting a Transportation Agreement is harder still, especially for dependents, and oddly, especially hard for military spouses to be hired in the same country where their sponsor was stationed.

8. LQA and TQSA allowances "are designed to cover substantially all average allowable costs for suitable, adequate quarters, including utilities. They are not intended to reimburse 100 percent of all of an employee's quarters costs or to provide ostentatious housing or extravagant meals." DOD 1400.25-M SC 1250.4.5.

9. Authority To Make Determinations.

a. Unless otherwise specified, where the DOD CPM provides for a "Head-of-Agency" decision, that authority has been delegated to the Director, [DOD] Civilian Personnel Management Services (CPMS), who may redelegate the authority as necessary. DOD 1400.25-M "DOD CPM" SC 1250.6.1.3.

b. "Individuals authorized to grant overseas allowances and differentials shall consider the recruitment need, along with the expense the activity or employing agency will incur, prior to approval." DOD 1400.25-M "DOD CPM" SC 1250.4.2.

IX. OVERSEAS PAY & HEALTH CARE.

A. **Base Pay** overseas is without locality pay, that is, it is not on the "Rest of U.S." pay chart. This absence is somewhat counterbalanced by the housing allowance (LQA). This means however:

- Lower annual pay raises for civil servants overseas, for example, when CONUS employees might average a 3.5% pay raise, OCONUS employees could expect a 2.5% pay raise.

- Depresses retirement pay for those who retire in an overseas area. State-side locality pay is computed as part of the "high-three" while overseas housing and other allowances are not.

B. **Special Overseas Pay Scales Are Not Used**. Each agency could establish compensation plans for U.S. citizens hired overseas including family members of U.S. employees assigned abroad. 22 U.S.C. 3968(a)(1). The U.S. Forces in Europe have not done so, e.g., local American hires for appropriated fund positions in Europe are paid according to established GS pay scales.

C. **Health Care**. The Secretary of Defense may provide civilian employees, and members of their families, abroad with health care benefits comparable to benefits provided by the Secretary of State to members of the Foreign Service and their families abroad. 10 U.S.C. 1599b.

X. RECRUITING FOR OVERSEAS POSITIONS. The following benefits are generally used to recruit candidates for overseas positions.

A. **Pay Retention (aka, Retain Pay, Save Pay) and Filling Overseas Positions**. Pay retention is much more an issue for overseas positions than positions in CONUS. The reasons for this are unclear, probably a combination of a tendency to classify higher level positions a grade lower than they would be in the States, and a desire to attract more experienced, i.e., higher graded, applicants for work in a complex overseas environment. If an activity wants to attract higher graded applicants from CONUS for an OCONUS position, e.g., have GS-14s interested in a GS-13 position, the activity can offer "pay retention" to the successful applicant.

1. **Pay retention is only available when all potential applicants have been informed in writing that it will be offered to successful applicants whose pay would otherwise be reduced if selected for the position. Written vacancy notices must state that pay retention is available**. OCPMINST 12536.1 (Supplement to FPM 990-2), Subchapt

S3 *and the enclosed* Memorandum from DASD(CPP), "Subj: Grade and Pay Retention" ¶b(10) (Feb 13, 1987).

2. Determination Authority. Normally, "Heads of overseas activities or their designees are delegated authority to determine the positions to which pay retention will be extended as a recruitment incentive ... ." OCPMINST 12536.1 (Supplement to FPM 990-2), Subchapt S3.

    a. "In other circumstances, as determined by addressees [ASN(M&RA) for the Navy], resulting from personnel actions initiated by management to further the agency's mission, [pay retention may be granted] to the extend that the intent of the law and regulations governing grade and pay retention is met." Memorandum from DASD(CPP), "Subj: Grade and Pay Retention" ¶(b)11 (Feb 13, 1987), *reprinted in* OCPMINST 12536.1 (Supplement to FPM 990-2).

3. Attributes of Pay Retention.

    a. An employee is entitled to the lowest rate of basic pay in the position to be occupied which equals or exceeds his or her rate of basic pay immediately prior to the eligibility for retain pay or movement to the position. If the rate of basic pay is within the pay range of the lower grade, then pay retention dos not apply. 5 C.F.R. 536.205(b)(2).

    b. If the employee's rate of basic pay exceeds the maximum rate of the lower graded position, the employee is entitled to the lower of the rate of pay the employee was receiving or 150% of the maximum rate of pay payable for the new grade. 5 C.F.R. 536.205(b)(3).

    c. If an employee moves to another position at the same grade while entitled to pay retention, the employee's rate of basic pay after movement may not be less than the maximum rate of basic pay for the newly applicable rate range. 5 C.F.R. 536.205(b)(4).

4. Pay Retention & Annual Pay Increases. The employee under pay retention is entitled to 50% of the amount of the increase in the maximum rate of basic pay payable for the grade of the employee's current position. 5 C.F.R. 536.205(c). When the maximum scheduled rate of pay for the position becomes equal to or grater than the employee's retained pay, pay retention stops and the employee then receives the full increases in the maximum rate of basic pay. 5 C.F.R. 536.205(d).

5. Loss of Pay Retention. An employee loses entitlement to pay retention when:

   a. The employee has a break in service of one day or more. 5 C.F.R. 536.209(a)(1).

   b. The employee declines a reasonable offer of a position with a rate of basic pay equal to or greater than the rate to which the employee is entitled under pay retention. 5 C.F.R. 536.209(a)(2). A reasonable offer is defined at 5 C.F.R. 536.206, and among other criteria, the offer must be in writing, must inform the employee that pay retention will stop, and it need not be in the same agency.

   c. The employee is demoted for cause or at the employee's request. 5 C.F.R. 536.209(a)(3).

6. For a discussion of what the employees grade and step will be upon return from an overseas assignment, see the discussion at 121.

B. **Reimbursement for Expenses Relating Sale & Purchase of Residence**.

1. Under 5 U.S.C. 5724a(d)(2), where an employee has transferred from a post of duty in the United States to a foreign duty location, reimbursement for the expenses related to the sale of the United States residence (or settlement of an unexpired lease) and purchase of a new residence upon return to the United States, is limited to:

   - A sale of the residence incident to **the return** of the employee from the foreign duty location;

   - The new State-side duty location is NOT the duty location the employee originally left from to go to the foreign duty location;

   - The transfer from the foreign duty location to the United States is in the interest of the Government; and

   - The employee sold the old residence or purchased the new residence **after** the official notification of the employee's reassignment to the United States. 5 U.S.C. 5724a(d)(3).

2. By way of comparison, for a State-side to State-side reassignment, reimbursement is authorized at the time of the initial transfer. The delay in reimbursement for overseas assignments is based on the expectation

that the employee transferred to a post overseas will retain his United States residence during his tour abroad, so that if he is again assigned to duty in the same commuting area, he will be able to live there. The absence of return rights simply means that the employee is not guaranteed reassignment to a particular place rather than meaning that he is precluded from being sent there. *Mark H. Swenson*, 15504-RELO (GSBCA April 18, 2001).

a. As it is expected an employee assigned overseas will retain residence in anticipation of return to the same permanent duty station, the employee qualifies for reimbursement of real estate expenses only when the employee is officially notified at the close of his overseas tour that he will be returning to a different non-foreign duty station. *Edward J. Nanartowich*, 15237-RELO (GSBCA Feb 2, 2001); *Robert J. Wright*, 15399-RELO (GSBCA Mar 7, 2001); *John W. Gray*, 15484-RELO (GSBCA Mar 7, 2001); *David B. Nelson*, 15609-RELO (GSBCA Aug 8, 2001).

b. Employee who transferred from Alaska to overseas duty location in the interest of the government was entitled to reimbursement for expenses when he sold his residence in Alaska after being told by agency officials he would not return to Alaska but instead he would be returned to his prior duty station in Georgia - which was then relocated to South Carolina. *Robert M. Hooks*, 72 Comp. Gen. 130 (1993).

c. Employee who transferred from Hawaii to Korea, and sold his residence in Hawaii, was entitled to reimbursement for real estate expenses because employee had been notified that he would not be returning to Hawaii, agency regulations precluded his return to Hawaii, and the employee returned from overseas to another duty station in the United States. *Timothy S. Haymend*, Comp. Gen. B-255822 (May 17, 1994).

3. Foreign Real Estate Costs. Neither statute nor regulation make any provision for reimbursement of expenses incurred by employee in settling unexpired lease at foreign location where the individual is stationed. *George Span*, 13728-RELO (GSBCA Feb 28, 1997).

C. **Statutes Specifically Referring to Recruiting Incentives for an Overseas Assignment**. Two statutes specifically refer to particular allowances as a recruiting incentive.

1. Allowances Based on Living Costs and Conditions of Environment. May be paid for conditions of environment which differ substantially from the continental United States and warrant an allowance as a recruitment incentive. 5 U.S.C. 5941(a)(2). May not exceed 25 percent of the rate of basic pay. 5 U.S.C. 5941(a). This allowance is not available to employees entitled, under 5 U.S.C. 5924, to a cost-of-living allowance. 5 U.S.C. 5941(b).

2. Pay - Post Differential For Especially Adverse Conditions. An additional incentive of up to 15% above the normal 25% limit on a post allowance, is allowed "for an assignment to a post determined to have especially adverse conditions of environment." 5 U.S.C. 5925(b).

D. **DOD Policy on Overseas Recruitment**. The DOD Policy relates that all overseas allowances and differentials (except the post allowance) "are specifically intended to be recruitment incentives for U.S. citizen civilian employees living in the United States to accept Federal employment in a foreign area. If a person is already living in the foreign area, that inducement is normally unnecessary." DOD 1400-25-M SC 1250.4.1, *referencing* DOD Dir 1400.25. That the allowances and differentials are to be used as an incentive is reinforced by the DOD policy that, "Individuals shall not automatically be granted these benefits simply because they meet eligibility requirements." DOD 1400-25-M SC 1250.4.3. Nevertheless, individuals who are authorized to grant overseas allowances may do so for overseas hires but they "shall consider the recruitment need, along with the expense the activity ... will incur, prior to approval." *Id.*, at SC 1250.4.2.

XI. SUMMARY OF ALLOWANCES FOR MOVE TO & AT THE FOCONUS PDS.

A. **New Employee Assigned to First Official PDS Outside the United States**. JTR C5010 Table 3.

1. Relocation Allowances the Agency Must Pay:

   a. Transportation of employee and immediate family. JTR Vol 2, Chapt 5, Part A.

   b. Per diem for employee only. JTR C7006-B.

   c. Transportation & temporary storage of HHG. JTR Vol 2, Chapt 5, Part D.

d. Miscellaneous Expense portion of the Foreign Transfer Allowance. DSSR § 241.2.

e. Relocation income tax allowance (RITA). JTR Vol 2, Chapt 16.

2. Relocation Allowances Which the Agency Has Discretion to Pay For:

a. Shipment of POV. JTR Vol 2, Chapt.5, Part E.

b. Foreign Transfer Allowance (FTA) Subsistence Expense for quarters temporarily occupied before departure from CONUS.

c. Temporary Quarters Subsistence Allowance (TQSA) after arrival. DSSR § 120.

3. Use of Relocation Service Companies, Property Management Services and Home Marketing Incentive Payments are not authorized for new appointees assigned to their first PDS. JTR Vol 2, Chapt 15, Part A.

B. **Employee Transfer from CONUS to FOCONUS PDS**. JTR C5010 Table 5.

1. Relocation Allowances the Agency Must Pay For:

a. Transportation & per diem for employee and immediate family members. JTR Vol 2, Chapt 5, Part A.

b. Miscellaneous expense allowance. JTR Vol 2, Chapt 5, Part G.

c. Transportation & temporary storage of HHG. JTR Vol 2, Chapt 5, Part D.

d. Non-temporary (extended) storage of HHG. JTR Vol 2, Chapt 5, Part D.

e. Relocation income tax allowance (RITA).

2. Relocation Allowances the Agency Has Discretion to Pay For:

a. FTA pre-departure subsistence expense portion for temporary quarters before departure. DSSR § 242.3.

b. TQSA for temporary quarters at the foreign PDS. DSSR § 120.

c. Shipment of POV. JTR Vol 2, Chapt 5, Part E.

d. Property management services. JTR Vol 2, Chapt 15, Part B.

XII. <u>TRANSPORTATION AGREEMENT (TA)</u>. 5 U.S.C. 5724(d), 5722; JTR C4001-C4012.

A. **<u>Requirements for a TA</u>**. "An agency may pay for [travel and transportation expenses] ... only after the individual selected for [the OCONUS] appointment agrees in writing to remain in the Government service for a minimum period of -- 12 months after his appointment, if selected for appointment to any other position." 5 U.S.C. 5722(b)(2); *applicable to current employees by* 5 U.S.C. 5724(d).

B. **<u>TAs & Duration of Tour</u>**. With respect to the agency paying travel and transportation expenses to return the employee from OCONUS, the employee must have served for a "minimum period" to be established in advance by the person acting as "head of agency" which will be "not less than one nor more than 3 years." 5 U.S.C. 5722(c)(2).

a. In either event, going to the OCONUS duty location or on return, the time limits can be waived if the employee is "separated for reasons beyond his control which are acceptable to the agency concerned." 5 U.S.C. 5722(b), (c). Grounds for releasing an employee from a tour of duty are discussed at JTR C4009, including transfers to other agencies.

b. The rules on tour duration are somewhat different for teachers and the statute does not apply at all to the Foreign Service. 5 U.S.C. 5722(c)(2), (d).

C. **<u>TA Defined</u>**. "A Transportation Agreement is a written understanding between a DoD component and an employee wherein the component agrees to furnish (depending on the circumstances) certain travel and transportation allowances in consideration for which the employee agrees to remain in Government service for at least a specified period. In the case of appointment or transfer to an OCONUS position, the employee also agrees to complete a prescribed tour of duty at the OCONUS PDS as consideration for return travel and transportation allowances." JTR C4001.A.

1. The return travel is to the employees "actual residence" by which the JTR means the employee's domicile or legal residence.

2. The JTR repeatedly talks in terms of negotiations between the employee and the "head of agency" with respect to a TA. Oddly though, the TA form is preprinted with no room for clauses to be added by the employee and provides for a signature only by the employee. DD Form 1617 "Department of Defense (DOD) Transportation Agreement - Transfer of Civilian Employees Outside CONUS (OCONUS)" (Nov. 1999) (available at www.dior.whs.mil).

3. OCONUS locally hired employees get the same TA allowances as an employee who came from CONUS but with a possible limit on the ability to ship a POV. JTR C4002-B1d *referencing* C5212-A5 (Employees hired OCONUS for their first duty in CONUS are not authorized to ship a POV at government expense; and OCONUS shipments of POVs are only authorized when the POV is to be used at an OCONUS PDS. Noting 5 U.S.C. 5727 *and referencing see* 68 Comp. Gen. 258 (1989)).

4. The TA may be an initial agreement or a renewal agreement. JTR C4001.A. A renewal agreement is signed when the employee completes the initial tour and agrees to a follow-on OCONUS tour.

    a. It is the "initial agreement" that "establishes eligibility for round trip travel and transportation allowances. JTR C4001.A.

    b. "A renewal agreement establishes eligibility for round trip travel and transportation allowances for an employee and dependents for the purpose of taking leave between consecutive periods of OCONUS employment. **A renewal agreement does not establish any HHG transportation authority**," JTR C4001.A (emphasis added), except for dependents who did not accompany the employee on the previous overseas tour. JTR C4002.B.3.

D. **When TA Eligibility Should Be Determined**. **Determine the employee's TA or continued TA eligibility before extending the job offer!** The actual JTR provision is written for OCONUS TAs, but the provision is applicable to all TAs. "Eligibility ... must be determined at the time of appointment or at the time the employee loses eligibility for return travel and transportation allowances. **This avoids misunderstandings later**." JTR C4002-B1.c (emphasis to understatement added). Typically, the JTR provides no guidance on how to proceed when a problem arises and TA eligibility has not

been determined up front or the employee was not informed that when they took a subsequent position that they lost their TA eligibility.

1. Failure to Negotiate TA At Time of Initial Hire & Subsequent Positions. What happens an overseas hire, having taken the first position without a TA, subsequently applies for a second position? Do the DOD CPM/JTR/DSSR provisions for granting a TA apply to the first position the person held or the second position the person is going into? There is no answer in any of the instructions. My recommendation is to justify the TA for both positions. Within the office of DASN(CP/EEO), the focus has been on the second position. That is, the question is whether the recruitment action for filling the second position justifies granting a TA under the criteria in the applicable instructions.

E. **Authority to Negotiate**. For all DOD components, the following have authority to negotiate TAs:

1. Commanding officers and their civilian counterparts who have appointing authority to fill positions, JTR C4001B.1;

2. Civilian personnel office employees designated to act for a CO in effecting personnel appointments, JTR C4001B.2; and,

3. Other individuals designated by the CO in specific cases. JTR C4001B.3.

F. **Loss of a TA** is discussed at JTR C4008 and employee violations of TA are discussed at JTR C4009 and C4352-C4353.

G. **Eligibility Requirements**. TA eligibility requirements for CONUS employees going OCONUS is unremarkable. That is not the case with regard to giving TAs to local hires. TA eligibility for OCONUS local hires take up most of the discussion in the JTR. Indeed, for OCONUS local hires the JTR emphasizes, "***A transportation agreement for a locally hired employee is not an entitlement. ... Individuals must not automatically be granted agreements simply because they meet eligibility requirements.***" JTR C4002B.1.a. (bold italic in original). As is typical of the instructions for overseas allowances however, the JTR does not relate that having met the eligibility requirements (which in itself is a misnomer) what additional criteria should be considered in deciding whether to grant a TA?

Note: Impact of TA on Other Benefits: Individuals without a TA (typically OCONUS locally hired American citizens) are NOT eligible for:

- Evacuation payments or allowances, DSSR § 612.3.(2);

- Emergency Visitation Travel (EVT) paid by the agency for visits home to sick relatives or funerals, JTR C6675.G.1;

- Depending on other circumstances, will not qualify for annual leave accumulation beyond 30 days (240 hours), 5 U.S.C. 6304(b)(2)(A)(iii); or

- Foreign Visitation Travel (FVT) for employees at a FOCONUS PDS to visit family members who have been evacuated from the PDS. JTR C6650.D.1.

H. **<u>These Are the Simple OCONUS Circumstances to Grant a TA</u>**:

1. An employee transferred from one OCONUS PDS to another OCONUS PDS. JTR C4002A.2. Note, there is no requirement for the employee to have had a TA at the original OCONUS PDS, and unlike LQA, neither is there a requirement that the employee's position move from the first PDS to the second PDS in order to be eligible for a TA.

2. A new appointee recruited for OCONUS duty at a PDS other than where the actual residence is located. JTR C4002A.3.

3. An employee recruited OCONUS for assignment to an OCONUS PDS. JTR C4002A.6.

4. Note, in each of these circumstances the JTR states that TA's "must be negotiated" but never actually states that a TA must be issued. JTR C4002.A.

I. **<u>These are the More Complex OCONUS Circumstances to Give Local Hires a TA</u>**.

Comment: Determining TA eligibility for OCONUS local hires is especially tricky - if management wants to provide a local candidate with a TA, the best advice when recruiting a person in the local area for a position that is normally filled from CONUS is to hire the person as if the person was hired in CONUS, e.g., instead of having a sailor discharge at the OCONUS PDS, have the sailor out-process

from the Navy in Norfolk and hire the person from there as a CONUS hire rather than at the OCONUS PDS where they have been stationed.

1. Purpose of OCONUS TAs. "The transportation agreement for a locally hired employee is specifically intended to be a recruitment incentive for a civilian employee with an actual residence in CONUS or a non-foreign OCONUS area, outside the geographical locality of the PDS to accept Federal employment in a foreign or nonforeign OCONUS area." JTR C4002-B.1. Thus, the basic requirements are:

   a. The TA is a recruiting incentive.

   b. The employee has to have an "actual residence" in CONUS or a non-foreign OCONUS area (e.g., Hawaii).

      (1) The TA is recorded on a DD Form 1617. Block G asks for "Actual Residence at Time of Appointment (To be determined at time of initial agreement)." The address to put here is NOT where you are actually living overseas, but your home of record or legal residence - the (typically) CONUS destination the government is required to return you to after the end of your OCONUS tour.

2. The JTR divides TAs for OCONUS local hires into two categories:

   - TAs for Foreign OCONUS (F-OCONUS) areas; and

   - TAs in non-Foreign OCONUS (NF-OCONUS) areas.

   According to the JTR, there are more requirements for getting a TA in a NF-OCONUS than a foreign one, though in practice, personnel offices may apply the additional requirements to TAs for local hires in F-OCONUS as well. The additional requirement for NF-OCONUS hires is that the position must be one for which qualified applicants are not readily available, i.e., the selecting official would typically be hiring from CONUS with a TA anyway. JTR C4002-B1d.

3. Giving TA's to an F-OCONUS Hire - Former Members of the U.S. Forces. In order to give a TA to an F-OCONUS local hire applicant who is a former member of the Armed Forces, three requirements have to be met. (Be in the authorized category, e.g., a separating military member, and as stated in JTR C4002-B2a., meet the "requirements in par. C4002-B2b(1) and C4002-B2b(2).") With respect to "OCONUS Local Hires" the JTR provides that "[f]oreign area local commanders shall negotiate an

initial agreement with a locally hired employee" when the following conditions are met:

a. Requirement 1 (JTR C4002-B.2.a(1)): The locally hired employee:

- was a member of the Armed Forces of the United States,
- while serving in a F-OCONUS area,
- is being appointed to a vacant appropriated fund civilian position before the expiration of the individual's TA accruing from the prior military service,
- and finally, that the vacancy is located in the same country where the former military member separated/retired from the Armed Forces.

Note: It is important not to turn these requirements into restrictions limiting the ability to hire non-local overseas applicants. This discussion is for **locally** hired applicants - not applicants who are from outside the local area. For DOD's purposes, "locally hired" means from within the country in which the post is located. DOD 1400.25-M SC 1250.3.4. Thus, the restrictions on giving a TA to local hires should not apply to an FOCONUS applicant from another country.

b. Requirement 2: The local area commander must determine that another candidate likely would have had to be transferred or appointed from the U.S. or a different OCONUS location to fill the position unless a TA is offered to the locally hired candidate. The JTR emphasizes, "***A locally hired candidate is not eligible for an agreement if the position is one for which out-of-country recruitment normally is not undertaken***." JTR C4000-B.2.b(1) (emphasis in original).

c. Requirement 3: At the time of appointment or assignment, the locally hired candidate must be able to establish to the satisfaction of the appointing official "a bona fide actual residence" in CONUS or a NF-OCONUS area. JTR C4002-B.2.b(2). The criteria for determining "a bona fide actual residence" is described in JTR C4004-B. The JTR phrase, "bona fide actual residence" essentially means the employee's domicile or "legal residence." The JTR list of criteria for determining actual residence is a fairly typical list for determining domicile. JTR C4004-B.2. The JTR notes that a person might establish an ineligible overseas domicile if the employee has

participated in local elections or obtained a waiver of U.S. tax liability based on a foreign residence. JTR C4004-B.2.

d. Additional Navy Requirement - Difficulty in Recruiting & Retention. Personnel Specialists within the office of the Deputy Assistant Secretary of the Navy (Civilian Personnel/Equal Employment Opportunity) (DASN (CP/EEO)) have also imposed an additional requirement on granting a TA to an overseas local hire - the activity must demonstrate difficulties in recruiting and retention for the overseas position in order to justify granting a TA.

(1) Basis for Additional Requirement. The source for the "recruiting and retention difficulties" requirement is the basic policy statement regarding overseas allowances in the DOD CPM that, "If a person is already living in the foreign area, that inducement is normally unnecessary." DOD 1400.25-M, SC 1250.4.1. There is no direct or referenced mention to "recruiting & retention difficulties" with respect to TA's. But the view is that since a TA "is normally unnecessary" for an overseas applicant, the hiring activity would need to show "recruiting & retention difficulties" to show that a TA is necessary.

(2) In this view, a "recruiting & retention problem" is not the same as saying that the position would normally be filled by a person from the United States (requirement 2).

4. Giving TA's to an F-OCONUS Hire: Employees of Other Government Activities, Contractors & International Organizations. In order to give a TA to an F-OCONUS local hire applicant who is an employee of another government activity, government contractor or international organization, three requirements have to be met. (Be in the authorized category, e.g., an employee of another federal agency, and as stated in JTR C4002-B2a., meet the "requirements in par. C4002-B2b(1) and C4002-B2b(2).") With respect to "OCONUS Local Hires" the JTR provides that "[f]oreign area local commanders shall negotiate an initial agreement with a locally hired employee" when the following conditions are met:

a. Requirement 1 (JTR C4002-B.2.a.(2)): The locally hired employee was:

(1) An employee of:

(a) another Federal department, agency, or instrumentality, or non-appropriated-fund activity,

(b) Government contractor,

(c) International organizations in which the U.S. participates, or

(d) Any other activity/agency which the F-OCONUS area command determines to be operating in support of the U.S. or its personnel in the area.

(2) When, the individual was:

- recruited in CONUS or in a NF-OCONUS area under employment conditions that provided for return travel and transportation allowances. JTR C4002-B.2.a.(2)(a).

  -- This provision is a bit obscure, but is taken to mean that the person had been recruited by the **previous employer** in the States (from which the DOD activity is now hiring him/her from) and had the equivalent of a TA with the previous employer.

- Committed to a specific vacant position with the DOD activity before separation from prior employment, and (JTR C4002-B.2.a.(2)(b).

- Is appointed not later than 1 month after termination of such employment. JTR C4002-B.2.a.(2)(c).

b. Requirement 2: The local area commander must determine that another candidate likely would have had to be transferred or appointed from the U.S. or a different OCONUS location to fill the position unless a TA is offered to the locally hired candidate. The JTR emphasizes, "***A locally hired candidate is not eligible for an agreement if the position is one for which out-of-country recruitment normally is not undertaken***." JTR C4000-B.2.b(1) (emphasis in original).

c. Requirement 3: At the time of appointment or assignment, the locally hired candidate must be able to establish to the satisfaction of the appointing official "a bona fide actual residence" in CONUS or a NF-OCONUS area. JTR C4002-B.2.b(2). The criteria for

determining "a bona fide actual residence" is described in JTR C4004-B. The JTR phrase, "bona fide actual residence" essentially means the employee's domicile or "legal residence." The JTR list of criteria for determining actual residence is a fairly typical list for determining domicile. JTR C4004-B.2. The JTR notes that a person might establish an ineligible overseas domicile if the employee has participated in local elections or obtained a waiver of U.S. tax liability based on a foreign residence. JTR C4004-B.2.

5. Giving TA's to an F-OCONUS Hire: Riffed Government Employees. In order to give a TA to an F-OCONUS applicant who has been riffed, two requirements have to be met. (Be in the authorized category, e.g., a riffed government employee, and as stated in JTR C4002-B2a., "An initial [TA] agreement may be negotiated with a locally hired employee described in par. C4002-B2a(3) ... only if the employee also meets the requirement in par. C4002-B2b(2).") With respect to "OCONUS Local Hires" the JTR provides that "[f]oreign area local commanders shall negotiate an initial agreement with a locally hired employee" when the following two conditions are met:

   a. Requirement 1 (JTR C4002-B.2.a.(3)): The former government employee:

      - Was separated by a RIF in the previous 6 months,

      - Is on a reemployment priority list, and

      - Has been authorized delay in return travel for the primary purpose of exercising reemployment priority rights.

Comment: There is no requirement to establish that another candidate would have been hired from CONUS if the local F-OCONUS applicant wasn't available.

   b. Requirement 2: At the time of appointment or assignment, the locally hired candidate must be able to establish to the satisfaction of the appointing official "a bona fide actual residence" in CONUS or a NF-OCONUS area. JTR C4002-B.2.b(2). The criteria for determining "a bona fide actual residence" is described in JTR C4004-B. The JTR phrase, "bona fide actual residence" essentially means the employee's domicile or "legal residence." The JTR list of criteria for determining actual residence is a fairly typical list for determining domicile. JTR C4004-B.2. The JTR notes that a person might establish an overseas domicile if the employee has

participated in local elections or obtained a waiver of U.S. tax liability based on a foreign residence. JTR C4004-B.2.

6. Giving TA's to an F-OCONUS Hire: To the F-OCONUS Dependent Spouse of an F-OCONUS Government Employee or Military Member.

   a. Note, from the context of the regulation it appears that an F-OCONUS spouse could also be given a TA after already having been hired by the DOD component. The spouse wouldn't have needed a TA prior to, for example, the death of the sponsor, and it would seem an extremely limited situation that the F-OCONUS sponsor dies, and then the surviving spouse decides to go to work and needs a TA in his/her own right. There is nothing in the language of the JTR C4002-B2 that prohibits a TA being issued to an employed surviving spouse subsequent to the death of the sponsor. This is unlike the other situations where it is clear the TA would be issued to the F-OCONUS applicant upon hire.

   b. In order to give a F-OCONUS spouse of a F-OCONUS sponsor a TA, two requirements have to be met. (Be in the authorized category, e.g., an F-OCONUS spouse, and as stated in JTR C4002-B2a., "An initial [TA] agreement may be negotiated with a locally hired employee described in ... par. C4002-B2a(4) below only if the employee also meets the requirement in par. C4002-B2b(2).") With respect to "OCONUS Local Hires" the JTR provides that "[f]oreign area local commanders shall negotiate an initial agreement with a locally hired employee" when the following two conditions are met:

      (1) Requirement 1 (JTR C4002-B.2.a.(4):

         (a) The F-OCONUS spouse:

            (i) Accompanied/followed the sponsoring military or civil service spouse to the F-OCONUS area,

            (ii) As the dependent, had authorization for return transportation under the sponsoring spouse's TA,

         (b) When one of the following occurs:

            (i) the sponsoring spouse dies;

(ii) the sponsoring spouse becomes physically or mentally incapable of continued government employment,

(iii) a divorce or legal separation

(I) "A legal separation when either the employee or the spouse initiates legal action to dissolve the marriage or one separates from bed and board short of applying for a divorce."

(II) A "Fidelity Tax" applies. The TA is "canceled" if the couple remarries or reconciles.

(iv) or, the sponsoring spouse "permanently departs the post/area."

(I) The TA is "canceled" if the sponsoring spouse returns to the post regardless of whether the sponsoring spouse has return transportation eligibility.

(II) Note, this regulatory distinction between "post/area" is unclear, and as interpreted, the distinction between post/area is probably redundant. The Navy rejected the proposal that when the sponsoring spouse retires, they have departed the post even if the sponsoring spouse remained in the area.

Comment: There is no requirement to establish that another candidate would have been hired from CONUS if the local F-OCONUS spouse wasn't available.

(2) Requirement 2: At the time of appointment or assignment, the locally hired candidate must be able to establish to the satisfaction of the appointing official "a bona fide actual residence" in CONUS or a NF-OCONUS area. JTR C4002-B.2.b(2). The criteria for determining "a bona fide actual residence" is described in JTR C4004-B. The JTR phrase, "bona fide actual residence" essentially means the employee's domicile or "legal residence." The JTR list of criteria for determining actual residence is a fairly typical list for determining domicile. JTR C4004-B.2. The JTR notes that a person might establish an overseas domicile if the employee has

participated in local elections or obtained a waiver of U.S. tax liability based on a foreign residence. JTR C4004-B.2.

(3) Example Where TA Was Denied. A dependent military spouse was competitively hired for a position that is normally recruited and filled by the transfer of an employee from the States. Contemporaneously, his military spouse retired from active duty, but instead of returning to the States, she remained in the overseas area due to her husband's selection for the civilian position. Hiring the local candidate saved the government the cost of a PCS, nevertheless, a TA was denied because none of the criteria of JTR C4002-B.2.a.(4) were met - the sponsoring retired military spouse had not left the service due to a physical or mental incapability, had not died, had remained in the local area and the couple had not divorced or separated. Letter, From OASN(M&RA) to Commanding Officer, NRCC Naples, Italy, "Living Quarters Allowance Waiver Request" (August 22, 2000). At the same time, LQA was granted under the DSSR regulations section 031.12. This is because the DSSR has a waiver provision for LQA while the JTR provisions for TA do not.

XIII. NOT MOVING FAMILY OVERSEAS - SEPARATE MAINTENANCE ALLOWANCE (SMA). 5 U.S.C. 5924(3); DSSR part 260.

A. **Purpose of SMA**. SMA is available to assist an employee to meet the additional expenses of maintaining the employee's spouse or dependents away from the overseas post, when:

- the employee is "compelled or authorized" to do so "because of dangerous, notably unhealthful, or excessively adverse living conditions" at the overseas post;

- "or for the convenience of the Government";

- or where the employee requests the allowance "because of special needs or hardship involving the employee or the employee's spouse or dependents."

5 U.S.C. 5924(3).

1. SMA is granted in lieu of any travel, transportation or other allowances for those members of the family. An employee who is receiving SMA on

behalf of a family member is not eligible for other allowances on behalf of that family member except as provided. DSSR § 261.2 *referencing* §242.7 (Transfer allowances payable to an employee with SMA family members), §252.8 (Home service transfer allowance and SMA), §262.3b (Transitional SMA following end of evacuation) and §267 (Determination of SMA rate).

B. **Amount**. SMA ranges from $4,300 per year for a single child to $15,900 for one adult and four or more additional family members. DSSR §267.1.a.

1. There are different circumstances for the grant of SMA, but generally allowances is effective the date of approval or the date of separation, whichever is later. DSSR §§ 265.1, 265.2. SMA is NOT retroactive. But, the DSSR also says that Involuntary SMA is effective the first day of separation or when the SF-1190 is submitted, whichever is later. DSSR § 262.4.a.Note.

C. **Types of SMA**.

1. Involuntary SMA is for the convenience of the government. SMA is typically granted when the OCONUS PDS is adverse, dangerous or notably unhealthy, and the agency has determined the need to exclude dependents from accompanying the employee. DSSR § 262.1.

   a. Involuntary SMA for a child terminates when the child is 21 unless the child is determined to be incapable of self support (due to a physical or mental impairment). A child in post secondary school/college and not currently working is NOT considered to be incapable of self support.

2. Voluntary SMA is for special needs or hardship of the employee. It may be authorized when an employee requests SMA for special needs prior to or after arrival at the PDS for reasons including but not limited to career, health, educational or family considerations for the spouse or other dependents. DSSR § 262.2.

   a. Voluntary SMA cannot be in the same country or be within 300 miles of the employee's PDS. DSSR § 263.7.

   b. Voluntary SMA terminates on a child's 18th birthday unless the child is determined to be incapable of self support (due to a physical or mental impairment). DSSR § 262.2.

3. Transitional SMA Involving Evacuation & Conversion of Post to Unaccompanied Status. When employees/ dependents have not yet arrived at a post which is under an evacuation/departure order and the employee has to continue to the post without the family, if the family doesn't qualify for DSSR Chapter 600 "Payments During Evacuation/Authorized Departure," or the equivalent payments under the limited provision of DSSR § 245, then, dependents who would normally accompany the employee to the post would be eligible for an involuntary Separate Maintenance Allowance. DSSR § 639 ("Employees/Dependents Assigned but Not Arrived at Post"), referencing § 260 ("Separate Maintenance Allowance"). See discussion at pages 139.

D. **Number of Choices Per Tour**. After an initial election to move the family overseas or not, only one change of election may be approved for Voluntary SMA. For example, employee moves with dependent child to OCONUS PDS. Due to adjustment problems, employee elects to return child to the States to live with other family members and attend school there. Later, the employee wants to bring the child back from the States to the OCONUS PDS. The employee can bring the child back at the employee's own expense but, having made one change already, the child will not add any entitlement to the employee's allowances. DSSR § 264.2(2).

E. **Qualifying For SMA**. SMA may be granted when the employee is separated from a member of a family and the conditions in DSSR § 262 reasonably appear to require a separation of at least 90 days or more. DSSR § 262.4a.

1. The 90 days may be reduced to 30 days when:

   - adequate medical facilities are not available in the area for pre- and post natal care, DSSR § 262.4.a(1);

   - members of the family are detained in the United States for medical clearance, DSSR § 262.4.a(2); or,

   - children must begin or complete a school year before the employee has arrived at post or after the employee has departed on transfer to another post in a foreign area. DSSR § 262.4.a(3).

2. Voluntary SMA is not available for the following situations (the absence of which the employee must certify to in the SMA application):

a. A family separation due to a legal separation from a spouse occurring through a divorce decree, whether limited, interlocutory, or final. DSSR § 262.3, 264.2(2).

b. A child whose legal custody is vested wholly, or in part, in a person other than the employee or the employee's current spouse, except for extraordinary circumstances. DSSR § 262.4, 264.2(2).

c. A child for whom the employee has joint legal custody and who will be residing with the other parent, except for extraordinary circumstances. DSSR § 262.4, 264.2(2).

d. A child, brother or sister, 18 years of age or older. Where the child is attending secondary school beyond 18, that the employee must terminate the SMA within 3 months from the day the child leaves secondary school. DSSR § 264.2(2).

F. **Visits By SMA Dependents**. When SMA dependents visit the employee's PDS, SMA continues for 30 days. If the SMA dependent has not departed by the 31st day, then SMA will be suspended until the SMA dependent departs en route to the SMA point. DSSR § 265.4.

G. **Termination of SMA**. When the employee transfers to a new post, SMA terminates. The employee must reapply for SMA at the new post. DSSR § 266.2.

H. **Applying for SMA**. An SF-1190 is used to submit a request for SMA accompanied by a memo requesting SMA, the required certifications, and other support for the claim, e.g., a doctor's statement. See DSSR § 264.1 (Involuntary SMA).

XIV. THE PCS - MOVING TO AN OVERSEAS ASSIGNMENT.

A. **Authority to Pay for Civilian Moves OCONUS**. The Secretary of Defense may provide civilian employees, and members of their families, abroad with travel benefits comparable to benefits provided by the Secretary of State to members of the Foreign Service and their families abroad. 10 U.S.C. 1599b. "When an employee transfers to a post of duty outside the continental United States, his expenses of travel and transportation to and from the post

shall be allowed to the same extent and with the same limitations prescribed for a new appointee under section 5722 of this title." 5 U.S.C. 5724(d).

B. **Advance Pay**. Up to three months advance pay can be paid upon assignment of an employee to a post in a foreign area. 5 U.S.C. 5927(a)(1). The DOD Civilian Personnel Manual provides that the advance in pay can be made when the employee is proceeding to or arriving at a foreign post. DOD 1400.25-M SC 1250.5.1.4.1 *referencing* DOD 7000.14R "DOD Financial Management Regulations," Volume 5, "Disbursing Policy and Procedures" and Volume 8, "Civilian Pay Policy and Procedures" (June 1994).

1. To apply for advance pay submit an SF-1190, the most recent leave and earnings statement, and a copy of the transfer orders. In the Navy the application is made to the HRSC servicing the destination PDS.

2. Repayments will be made by payroll deduction over a maximum 26 pay periods, or partial, or lump-sum payments. Repayment begins the first pay period after receipt or following arrival at the foreign post, whichever is later. DOD 1400.25-M SC 1250.5.1.4.2.

C. **Setting Travel & Per Diem Rate**. The per diem rate for the Continental United States is set by GSA. 5 U.S.C. 5702(a)(1)(A). Outside the continental United States the per diem rate is set by the President or his designee for travel. 5 U.S.C. 5702(a)(1)(A).

D. **Entitlement to Travel & Transportation Allowances - Who Gets What**. This subject is best described in 41 C.F.R. Subchapter B "Relocation Allowances" Part 302-3 "Relocation Allowance by Specific Type."

1. New Appointees When First Official Station is OCONUS.

a. Are defined at 41 C.F.R. 302-3.1. Not specifically addressed are military members who join civil service - they would also be new appointees.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.1, Table B, Column 1):

1. Transportation of employee & immediate family;

2. Per diem for employee only;

3. Transportation & temporary storage of household goods (HHG); and,

4. Extended storage of HHG.

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.1, Table B, Column 2):

1. Shipment of POV;

2. Foreign Transfer Allowance (FTA) (subsistence expense) for quarters occupied temporarily before departure;

3. Temporary quarters subsistence allowance (TQSA) at the foreign destination; and

4. The miscellaneous expense portion of the FTA is authorized incident to first official station travel to a foreign area.

2. Employees Transferred from CONUS to OCONUS.

a. "Employees" may include employees separated as a result of a RIF or transfer of function who are re-employed within 1 year. 41 C.F.R. 302.100.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.101, Table B, Column 1):

(1) Transportation & per diem for employee & immediate family.

(2) Miscellaneous expense allowance;

(3) Transportation & temporary storage of HHG;

(4) Extended storage of HHG; and,

(5) Relocation income tax allowance (RITA).

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.101, Table B, Column 2):

(1) A Foreign Transfer Allowance (FTA) for quarters occupied temporarily before departure;

(2) Temporary quarters subsistence allowance (TQSA) at the OCONUS PDS;

(3) Property management services; and,

(4) POV shipment.

3. Employees Transferred from OCONUS to CONUS.

a. "Employees" may include employees separated as a result of a RIF or transfer of function who are re-employed within 1 year. 41 C.F.R. 302.100.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.101, Table C, Column 1):

(1) Transportation & per diem for employee & immediate family;

(2) TQSA may be authorized preceding final departure subsequent to the necessary vacating of residence quarters;

(3) Miscellaneous expense allowance;

(4) Sale & purchase of residence transaction expenses or lease termination expenses when employee is transferred in the interest of the Government to a different non-foreign area official station than from the official station from which transferred when assigned to the foreign official station;

(5) Transportation & temporary storage of HHG;

(6) Extended storage of HHG only when assigned to a designated isolated official station in CONUS; and

(7) Relocation income tax allowance (RITA).

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.101, Table C, Column 2):

(1) Shipment of a POV.

4. Employees Transferred Between OCONUS Stations.

a. "Employees" may include employees separated as a result of a RIF or transfer of function who are re-employed within 1 year. 41 C.F.R. 302.100.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.101, Table D, Column 1):

(1) Transportation & per diem for employee & immediate family;

(2) TQSA;

(3) Transportation & temporary storage of HHG;

(4) Miscellaneous expense allowance;

(5) Extended storage of HHG; and

(6) Relocation income tax allowance (RITA).

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.101, Table D, Column 2):

(1) Shipment of a POV; and

(2) Property management services.

5. Employees Returned From OCONUS to Place of Actual Residence (Domicile) for Separation.

a. "Employees" may include employees separated as a result of a RIF or transfer of function who are re-employed within 1 year. 41 C.F.R. 302.100.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.101, Table F, Column 1):

(1) Transportation for employee & immediate family;

(2) Per diem for employee only; and

(3) Transportation & temporary storage of HHG.

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.101, Table F, Column 2):

(1) Shipment of a POV.

E. **Transfer of New Employee**. For a new appointee and "his immediately family" an agency may pay for the travel, transportation and movement of household goods and personal effects (subsection (a)(1)) and transporting a privately owned vehicle (POV) (subsection (a)(3)), "from the places of actual residence at the time of appointment to the place of employment" OCONUS. 5 U.S.C. 5722.

1. The new appointee must agree to stay OCONUS for a period of 12 months after his appointment (subsection (b)(2)), or for one school year for a teaching position with DOD (subsection (b)(1)). 5 U.S.C. 5722 (except if a substitute teacher).

   a. If the employee or teacher leaves before the allotted time, then the "money spent by the Government for the expenses is recoverable from the individual as a debt due the Government" unless the individual is "separated for reasons beyond his control which are acceptable to the agency concerned." 5 U.S.C. 5722(b).

2. The JTR provision on individuals recruited for an OCONUS PDS focuses on dependent travel.

   a. When a person is recruited in CONUS for an OCONUS PDS, dependent travel is authorized from the actual residence to the OCONUS PDS. JTR C7002.B.2.a. Dependent travel of persons recruited OCONUS for assignment to an OCONUS PDS in a locality different from the actual PDS, is authorized to the new PDS. JTR C7002.B.2.b. The major exception being restrictions on dependent travel to the new PDS discussed in JTR Vol 2, Chapter 12 "Evacuation and Adverse Conditions Travel."

   b. When a person is recruited locally OCONUS for employment in the same OCONUS area and a TA is executed iaw JTR C4002-B2, dependent travel is authorized from their actual residence to the PDS provided the dependents are not in the OCONUS area when the employment begins. The major exception being restrictions on dependent travel to the new PDS discussed in JTR Chapter 12 "Evacuation and Adverse Conditions Travel."

3. Travel expenses not authorized for a person who traveled from New York to England and then was hired in England when he was not a new

appointee nor an appointee at all at the time of his departure from New York, nor was he entitled to expenses incurred in traveling to and from the United States following the hiring in England. *Schremp v. United States*, 166 F.Supp. 610 (Ct. Cl. 1958).

4. The 12 month service obligation is to the government, not to any particular agency in the government, even when the transportation agreement requires that the 12 months be spent with the employing agency. *Finn v. United States*, 428 F.2d 828 (Ct. Cl. 1970).

5. The 12 month period includes time spent by the employee in leave without pay status (LWOP) but not when in an absent without leave (AWOL) status. 59 Op. Comp. Gen. 25 (1979). But, where an employee effectively abandoned his employment by beginning to work for another employer, the 12 month requirement cannot be satisfied by a combination of applications for annual leave, sick leave, and LWOP. *John P. Maille*, 71 Comp. Gen. 199 (1992).

6. A voluntary retirement less than 12 months after a transfer constitutes grounds for an agency to require reimbursement. 61 Op. Comp. Gen. 361 (1982).

7. Employee entitled to ship household goods to overseas duty post may ship goods from or to any location, but maximum expense born by government is limited to the cost of a single shipment by the most economical route from the employee's last official station to the new official station. 60 Comp. Gen. 30 (1980).

8. Former active duty Army officer is considered a new appointee rather than an employee for purposes of relocation benefits upon accepting civilian employment with DOD. *Edward J. Curran*, 15447-RELO (GSBCA Apr 4, 2001).

F. **Transfer of Current Employee**. "When an employee transfers to a post of duty outside the continental United States, his expenses of travel and transportation to and from the post shall be allowed to the same extent and with the same limitations prescribed for a new appointee under section 5722 ... ." 5 U.S.C. 5724(d). "The regulations prescribed under this section ... shall take effect only after the employee has been given advance notice for a reasonable period. Emergency circumstances shall be taken into account in determining whether the period of advance notice is reasonable." 5 U.S.C. 5724(j).

1. BUT: "When a transfer is made primarily for the convenience or benefit of an employee ... or at his request, his expenses of travel and transportation and the expenses of transporting, packing, crating, temporarily storing, draying, and unpacking of household goods and personal effects may not be allowed or paid from Government funds." 5 U.S.C. 5724(h).

2. JTR Provision for moves to and between OCONUS PDSs focuses on dependent travel. When a current employee goes from a CONUS PDS to an OCONUS PDS dependent travel may originate at the employee's PDS, some other place, partially or both, with limits on costs to an alternate destination. JTR C7002.B.1.a. When the transfer is between OCONUS PDSs, travel is authorized for the dependents to the new PDS, or when an employee is authorized travel back to the actual residence (i.e., back home), the employee may elect to have the dependents return to the actual residence. JTR C7002.B.1.b. The major exception being restrictions on dependent travel to the new PDS discussed in JTR Vol 2, Chapter 12 "Evacuation and Adverse Conditions Travel."

3. When the dependents did not accompany the employee on the initial tour and the employee agrees to serve an additional OCONUS tour and executes a renewal agreement, whether for the same or a different OCONUS PDS, dependent travel is authorized from the employee's actual residence (i.e., the residence back home) or authorized constructive cost from a different location. JTR C7002.B.4.

4. No reimbursement of moving expenses allowed where employee made written request for transfer, agreeing to pay own moving expenses, in order to be located to office in area where wife had accepted employment with a private company, and where there was no showing that government had special need for employee at new office. *McClary v. United States*, 14 Cl. Ct. 728 (1988).

5. Employee not entitled to reimbursement for relocation expenses since he applied for and otherwise took the initiative in obtaining a transfer. 56 Comp. Gen. 709 (1977).

6. BUT: For the purpose of determining relocation benefits, where selection and transfer of employee is pursuant to merit promotion program, it is generally deemed to be action taken in the interest of the government. *Steven G. Lovejoy*, 15826-RELO (GSBCA Oct 3, 2002). Generally, where an agency recruits or requests employee to transfer to a different location, such transfer is regarded as being in the interest of the

government and PCS costs are payable. *Darrell M. Thrasher*, 13968-RELO (GSBCA Sept 9, 1997).

7. BUT: Where the employee voluntarily applies for a transfer at the same grade as already held, the transfer is presumed NOT to be in the interest of the government - even where the employee has responded to the vacancy announcement and has been competitively selected. *Steven D. Hanson*, 14270-RELO (GSBCA Oct 7, 1997).

8. The employing agency makes determination as to whether a transfer is in the interest of the government and GSBCA will not overturn agency's exercise of discretion unless it is convinced that the determination was arbitrary, capricious, or clearly erroneous. *Gerard R. Sladek*, 14145-TRAV (GSBCA Nov 7, 1997).

G. **Recoupment & Waiver of Claims**. For a discussion of the interaction of Debt Collection Act of 1982 (5 U.S.C. 5514, 31 U.S.C. 3716), and recoupment under the travel and subsistence provisions, see 64 Comp. Gen. 142 (1984). The DOD Civilian Personnel Manual states:

> Waiver of Claims. Claims resulting from erroneous disbursement of pay and allowances may be processed in accordance with DOD 7000.14-R. The foreign post and special incentive differentials meet the definition of pay under 5 U.S.C. 5584.
>
> DOD 1400-25-M SC 1250.6.3 (references omitted).

H. **Transfers Between Agencies**. When an employee transfers from one agency to another, the gaining agency pays the travel and transportation expenses. The exception is when the transfer is the result of a RIF or transfer of function, by agreement between the agency heads, either then gaining or losing agency may pay the expenses. This exception does not apply to "expenses authorized in connection with a transfer to a foreign country." 5 U.S.C. 5724(e).

1. Where the employee had return travel rights and travels before the transfer from one agency to the other is effected - then the losing agency funds the relocation expenses. 65 Comp. Gen. 900 (1986).

I. **Assignment to Overseas Location Where Dependents Are Not Allowed**. When an employee is assigned to an OCONUS location with "adverse

conditions" where dependents are not allowed, the government will transport the employee's dependents "to an alternate location" designated by the employee or the dependents when it is impracticable to secure an employee's designation. JTR C12001.A & C, *citing* 5 U.S.C. 5725. The dependents and HHG may later be moved to the PDS if the restriction is moved as long as the employee has, or agrees to, 1 year at the station. JTR C12001.C. Otherwise, the dependents and HHG will be moved to the employee's follow-on PDS.

J. **Storage Expenses for Household Goods & Personal Effects**.

1. New appointees and employees assigned to a permanent duty station (PDS) OCONUS may be allowed storage expenses and related transportation and other expenses for house-hold goods (HHG) and other personal effects, when - the duty station is one to which he cannot take or at which he is unable to use the items, or the head of the agency authorizes the storage as in the public interest or for reasons of economy. 5 U.S.C. 5726(b).

2. The items in storage count against the maximum weight allowed to be shipped. 5 U.S.C. 5726(b).

K. **Transport of Motor Vehicles - Privately Owned Vehicles (POVs)**. Transportation of an employee's property does not include authorization to transport an employee's motor vehicle unless specifically authorized by statute or regulation. 5 U.S.C. 5727(a).

1. The basic authorization to ship a POV overseas is 5 U.S.C. 5722(a)(3), 5724(d).

Note: Agreements with European host nations may limit the number of POV's, including motorcycles, that members and their families may operate.

2. 5 U.S.C. 5727(b) provides a POV owned by an employee, new appointee, or student trainee, may be transported at Government expense to, from, and between the continental United Sates, or between posts of duty outside the continental United States when:

- the employee is assigned to the post for other than temporary duty; and

- the employing agency determines it is in the interest of the Government for the employee to have use of a motor vehicle at the post of duty.

This authorization, which seems to cover all combinations of moves, has been interpreted to nonetheless limit POV moves to and from OCONUS. Employees hired OCONUS for their first duty in CONUS are not authorized to ship a POV at government expense; and OCONUS shipments of POVs are only authorized when the POV is to be used at an OCONUS PDS. JTR C4002-B1d *referencing* C5212-A5 *noting* 5 U.S.C. 5727 *and referencing see* 68 Comp. Gen. 258 (1989). The examples given in the JTR are, "A traveler residing in Hawai'i, who was hired locally and is later transferred from the Hawai'i PDS to a CONUS PDS is not authorized POV transportation to CONUS. Similarly, a traveler residing in Hawai'i, hired locally for duty at a PDS in CONUS is not authorized transportation for a POV to CONUS." JTR C5212

3. An employee may transport only one motor vehicle during a 4-year period unless that the head of the agency concerned determines that replacement of the motor vehicle is necessary for reasons beyond the control of the employee and it is in the interest of the Government and authorizes in advance a replacement motor vehicle. 5 U.S.C. 5727(d).

4. Transportation of motor vehicles may be by commercial means if available at a reasonable rate or by Government means on a space available basis. 5 U.S.C. 5727(e).

5. Transportation of POVs is discussed primarily at JTR C5212 (covering when POV shipment is and is not authorized) and C5217 (delivery of the POV at port), and replacement POVs at JTR C5232.

L. **Foreign Transfer Allowance (FTA)** is available for "extraordinary, necessary, and reasonable subsistence and other relocation expenses (including unavoidable lease penalties), not otherwise compensated for, incurred by an employee incident to establishing himself at post of assignment in ... a foreign area." 5 U.S.C. 5924(2)(A). This includes expenses incurred in the United States prior to departure. 5 U.S.C. 5924(2)(A), DSSR § 241.1.a. And also includes expenses after departure. It is implemented by JTR C1004 and DSSR § 240.

1. There are three parts to the Transfer Allowance applicable to DOD employees as provided in JTR C1004.C:

a. Miscellaneous Expenses for new employees assigned CONUS (DSSR § 242.6) and Miscellaneous Expense Allowance (MEA) for new employees assigned OCONUS and for current employees (covered in JTR part C5300).

b. Pre-Departure Subsistence Expense, and

c. Lease Penalty Expense.

2. Agencies have the option of using the SF-1190 for FTA claims or their own forms. DSSR § 245.2. Advance payment of FTA is authorized. DSSR § 243.

3. Miscellaneous Expenses Portion - Differences Between New and Current Employees. The JTR, at § C1004.B, distinguishes between a Miscellaneous Expense (ME) for new appointees covered by DSSR § 242.6, and a Miscellaneous Expense Allowance (MEA) for current employees, covered by JTR part C5300. The reason for this distinction is unclear as the allowances are nearly identical and the differences barely worth noting. Further, it is MEA that is payable to new employees who report to their first PDS overseas. JTR C5305.B. Note 2. Accordingly, this outline will focus on rules for MEA.

a. MEA Eligibility.

(1) MEA can be paid when four criteria are met:

(a) The move is a PCS;

(b) A TA is executed;

(c) The employee moves out of the old residence; and

(d) The employee establishes a new temporary or permanent residence.

JTR C5305.A.1 - 4, *citing* GSBCA 16018-RELO (August 15, 2003).

(2) The following employees are NOT eligible for MEA:

(a) Employees performing RAT unless a PCS is authorized in conjunction with the RAT and the employee has

discontinued residence at the old PDS and established a residence at the new PDS. JTR C5305.B.2.

(b) An employee assigned to an OCONUS PDS returning to the actual residence for separation. JTR C5305.B.3.

(c) Employee going to/from a training location who is authorized dependent transportation instead of per diem or AEA under C4500. JTR C5305.B.4.

b. MEA can either be paid as a lump sum or itemized.

(1) Lump sum (i.e., no receipts are required). For an employee without dependents, the amount is $500 or one week's pay, whichever is less. For an employee moving with dependents, the amount is $1,000 or the equivalent of two weeks pay, whichever is less. JTR C5310.A.1, .B.1 - .2. Where the employee has dependents but the HHG and dependents are not relocated, MEA is $500 or 1 week's pay whichever is less, unless the dependents move and the other criteria are met within 2 years, then full MEA is authorized. JTR C5310.B.3.

(2) Itemized (requires receipts or other acceptable evidence justifying amounts claimed). The amount is capped based on the salary of the employee at the destination PDS. For an employee without dependents, the cap is either 1 week's salary or 1 week's salary for a GS-13 step 10, whichever is less. For an employee with relocating dependents, the cap is 2 weeks' salary or 2 weeks' salary for a GS-13 step 10, whichever is less. JTR C5310.C.

(3) Expenses that are covered, JTR C5310.D:

- Disconnecting & connecting appliances, equipment and utilities;

- Converting household equipment and appliances for use overseas including transformers;

- Cutting and fitting carpets, draperies and curtains moved from one residence to the other (not the cost of new rugs etc);

- Utility fees or contract deposits that are not offset by eventual refunds;

- Losses on non-transferable/non-refundable contracts for medical, dental, food lockers and private institutional care;

- Transportation of cats, dogs and other house pets (excluding horses, fish, birds, and various rodents because of their size, exotic nature, or restrictions on shipping, host country restrictions and special handling difficulties), and required quarantine of pets (but not for the boarding of pets while preparing to move and during the move);

- Automobile registration, driver's license, taxes and bonds;

- Re-installation of catalytic converter (the cost for removing the converter is not mentioned);

- Required removal (e.g. tinted windows) or installation (e.g., special lights) of auto parts required by the host country law;

- Agent fees incurred for living quarters in a foreign area that are not offset by an eventual refund;

- Reassembly, set up and tuning of a piano;

- Fee for post office box rented to provide a constant mailing address during move; and

- Similar costs.

(4) Expenses that are NOT covered, JTR C5310.E:

- Losses in selling or buying real or personal property or costs related to such transactions;

- Costs which are otherwise reimbursable under another statute or regulation or covered by insurance;

- Costs for moving household goods in excess of authorized weight allowance;

- Increased cost of insurance for the HHG move;

- Cost for purchasing new items such as new rugs or draperies, or appliances;

- Costs incurred for reasons of personal taste or preference not required because of the move;

- Higher taxes (e.g., for income, real estate, sales) at the new post;

- Fines of other penalties (e.g., for violating traffic laws) imposed on the employee or dependents, or judgments, court costs or similar expenses;

- Accident insurance premiums or liability costs incurred in connection with travel or any other liability resulting form uninsured damages caused by accidents for which the employee or dependents are held responsible.

- Damage or loss of luggage or clothing or other personal items while traveling;

- Medical expenses en route;

- Costs of restructuring or remodeling quarters, garages, or buildings.

d. MEA is submitted on a travel claim along with a certification that the old PDS residence has been discontinued and a new PDS residence has been established. JTR C5310.F.

4. Predeparture Subsistence Expense. JTR C1004.C.3; DSSR § 242.3. For lodging, meals, and laundry for up to 10 days before departure beginning not more than 30 days after having vacated residence quarters. It does not include local transportation expenses.

   a. Eligibility. Only applied to employees departing a PDS in the United States for a foreign PDS, or to a new appointee traveling from his/her actual residence to the foreign PDS. JTR C1004.C.3; DSSR § 242.3

   b. This allowance is payable in a partial flat-rate method or an actual cost method - the option is with the agency as to which type it authorizes. DSSR § 242.3.a, .3.b.

c. Partial Flat-Rate Method (requires receipt for lodging only) DSSR § 242.3a. The disadvantage of the flat rate is that it caps expenses separately for lodging and meals & incidental expenses.

(1) Actual lodging expenses up to the lodging portion of per diem in the departure locality, plus taxes on lodging, plus a flat rate for meals and incidental expenses (M&IE).

(a) The lodging portion is computed at 100% of the per diem lodging rate for the member, 75% for each dependent age 12 and over, and 50% for each dependent under 12.

(b) The flat rate for M&IE is 100% of per diem for the employee, 75% for each dependent age 12 and over, and 50% for each dependent under 12.

(2) Actual Subsistence Method. DSSR § 242.3.b. Allows reimbursement for documented costs on the maximum per diem without a breakdown between lodging and meals & incidental expenses. Lodging taxes in the US are reimbursed separately. (Overseas the taxes are loaded into the per diem rate.)

(3) Receipts are required for lodging and dry cleaning while a certified list of other expenses incurred is required (daily expenses for meals and laundry).

(4) Reimbursement is limited to actual expenses capped at 100% of per diem for the member, 75% for each dependent age 12 and over, and 50% for each dependent under 12.

e. FTA is claimed using an SF-1190 and FTA Worksheet (DSSR 240), and in the Navy, filed with the HRO or HRSC.

5. Lease Penalty Expense. DSSR § 242.4. This allowance is designed to help offset the expense of a lease penalty unavoidably incurred by an employee who is reassigned, typically as a result of a management initiated action. Note that in the European theater this expense is avoided by having a reassignment clause in the lease - the availability for which would also largely negate reimbursement of the expense. Qualifications for the expense are:

a. The employee's transfer to a new foreign post was due solely to actions by the agency and unusual conditions beyond the control of the employee.

b. The termination of the lease and the departure of the employee was not the result of any specific actions by the employee to seek a curtailment of the assignment for a transfer or promotion.

c. The employee was not negligent in promptly notifying the landlord of the intent to terminate the lease after receiving an official notice of transfer.

d. The employee used all reasonable steps to sublease or assign the lease to others.

e. Both the employee and agency made reasonable efforts to avoid the full lease penalty by delaying the employee's transfer to a new foreign post of assignment.

M. **Temporary Quarters Subsistence Allowance (TQSA) at Destination**. For the "reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and family." 5 U.S.C. 5923(a)(1); JTR C1003 *referencing* DSSR § 120.

1. Terminology - Overseas this allowance is TQSA, in CONUS these expenses are TQSE.

2. Purpose of TQSA. TQSA is intended to assist in covering the average cost of adequate but not elaborate or unnecessarily expensive accommodations in a hotel, pension, or other transient-type quarters at the post of assignment, plus reasonable meal and laundry expenses after first arrival at a new post of assignment in a foreign area or preceding final departure from the post. DSSR § 122.1; JTR C1003.

3. Paid for up to 90 days after first arrival at foreign post or until permanent quarters are occupied. 5 U.S.C. 5923(a)(1)(A); DSSR § 121.a. This period may be extended for not more than 60 additional days if it is determined "that there are compelling reasons beyond the control of the employee ... ." 5 U.S.C. 5923(b); DSSR § 122.2.

4. Standard TQSA - The amount of TQSA declines each 30 days.

   a. The First 30 Days. The employee (or initial occupant) gets 75% of the per diem rate for the post. Each additional family member occupant age 12 or over gets 50% of the per diem and each additional occupant under 12 gets 40%. DSSR § 123.31.

b. The Second 30 Days. The employee (or initial occupant) gets 65% of the per diem rate for the post. Each additional family member occupant age 12 or over gets 45% of the per diem and each additional occupant under 12 gets 35%. DSSR § 123.32.

c. The Third 30 Days. The employee (or initial occupant) gets 55% of the per diem rate for the post. Each additional family member occupant age 12 or over gets 40% of the per diem and each additional occupant under 12 gets 30%. DSSR § 123.33.

d. Extension Period. It's the same as the Third 30 Day Period. The employee (or initial occupant) gets 55% of the per diem rate for the post. Each additional family member occupant age 12 or over gets 40% of the per diem and each additional occupant under 12 gets 30%. DSSR 123.34 *referencing* § 123.33.

5. Alternative TQSAs.

a. Agency Options. Instead of paying TQSA, the agency or post may choose to provide temporary quarters directly, to limit the number of days TQSA may be paid to fewer than the maximum number of days, and/or not to pay any TQSA if quarters with cooking facilities are provided. DSSR § 122.3.

b. Employee Occupies No Cost Temporary Housing. If the employee is able to occupy no cost housing, then the employee will only receive actual meal, laundry and dry cleaning costs up to a maximum amount payable the first 30 days (75% of per diem for first person, 50% age 12 and over, and 40% for those under 12). DSSR §123.35 *referencing* §123.3.

c. High Cost Lodging Locality. "In exceptional circumstances" when temporary lodging facilities are "extremely limited" and the costs "excessive" the head of agency may authorized no reduction in the costs for periods after the first 30 days. DSSR §123.36 *referencing* §123.31.

6. Definition of Family Member. The parent having executed a special power of attorney "granting guardianship" to his parent, an employee and spouse at an OCONUS PDS assumed temporary custody of two grandchildren. The JTR, does not define "legal guardianship" so the GSBCA turned to Arizona state law (the state in which the power of attorney was executed) which provided that a legal guardianship can be

established only by judicial determination. Since a legal guardianship did not exist, the grandchildren could not be members of the employee's immediate family and the employee was not authorized travel and transportation costs and overseas allowances (TQSA) on their behalf. GSBCA 16337-RELO, (April 19, 2004).

7. Employees living on TQSA are not eligible for COLA. 5 U.S.C. 5924(1). Nor is an employee on TQSA eligible for a Post Allowance. DSSR § 127.

8. Submit an SF-1190 and a TQSA Worksheet DSSR 120. Hotel receipts are required along with a certification for meals and laundry expenses. Receipts may be required for individual meals over a certain amount.

XV. ALLOWANCES, COMP TIME & ANNUAL LEAVE AT THE OVERSEAS PERMANENT DUTY STATION.

A. **Allowances at the PDS After the PCS Move**. As is typical and frustrating in this area, the DOD Instruction doesn't state what allowances are available, rather, it directs the reader to another set of instructions, this time the Department of State Standardized Regulations (DSSR). DOD civilian employees living in foreign areas are authorized all of the allowances in the DSSR except for:

- The wardrobe portion of the Home Service Transfer Allowance;

- The wardrobe portion of the Foreign Transfer Allowance; and the

- Education allowance (but transportation of student family members is authorized).

DOD 1400.25-M SC 1250.5.1. Allowances specifically addressed in the DOD Civilian Personnel Manual are the:

- Quarters Allowance, commonly referred to as the Living Quarters Allowance or LQA;

- Post Allowance; and the,

- Education Allowance.

B. **Overseas Allowances - General Rules**. 5 U.S.C. 5922 - 5928 (Quarters allowance, Cost-of-living allowances, Post differentials, Compensatory time off at certain posts in foreign areas, Advances of pay, Danger Pay).

1. The employee must be a citizen of the United States officially stationed in a foreign area whose basic pay is fixed by statute or administratively in conformity with rates paid by the Government for similar work in the Continental United States. 5 U.S.C. 5922(a).

2. Advances on allowances are available. If entitlement to the allowances does not subsequently accrue, the agency may waive collection "if it is shown that recovery would be against equity and good conscience or against the public interest." 5 U.S.C. 5922(b).

C. **Post Allowance**. 5 U.S.C. 5941; DOD 1400.25-M "CPM" SC1250.5.1.2 (Dec. 1969); DSSR § 220.

1. A cost of living allowance, known as a Post Allowance (PA) is paid "to offset the difference between the cost of living at the post of assignment ... in a foreign area and the cost of living in the District of Columbia ... ." 5 U.S.C. 5924(1). PA does not include the difference in the cost of housing. DSSR § 221. The amount may not exceed 25 percent of the rate of basic pay. 5 U.S.C. 5941(a).

   a. PA is typically described in terms of a percentage, e.g. 5%, 10% - a description that masks the allowance's complexity. The concept for the PA is to allow employees in the foreign area to have the same "spendable income" as they would in Washington D.C. by making up for the higher costs of goods and services in the foreign area. DSSR § 222. The allowance is published by the State Department and are available at: www.state.gov/m/a/als/920 "Table of Allowances (§ 920)".

   b. "Spendable income" is that portion of basic compensation available for spending after deductions for taxes, gifts and contributions, savings (including insurance and retirement) and U.S. shelter and household utility expenses. DSSR §§ 222, 228.2.

   c. The comparative cost of living considers normal expenses of the employee at the post (including Exchange & Commissary purchases) and additional costs resulting from local climatic, health conditions and customs, compared to the costs for the same or similar items and

conditions affecting government employees in D.C. Education costs are not considered in the mix. DSSR § 222.

(1) These U.S. costs are based on national Consumer Expenditure Surveys conducted periodically by the Bureau of Labor Statistics of the Department of Labor. These Expenditure Surveys include the "basket of goods" that is sometimes mentioned with respect to the Post Allowance.

d. With D.C. representing 100, the result is a "Cost of Living Index for Foreign Location" which is converted into 20 "Post Allowance Class" ranging from 5% - 160%. For example, a Cost of Living Index from 128 - 132 converts to the 30% Post Allowance Class, which is to say, the cost of living is 30% more expensive in the foreign area than D.C. DSSR § 228 (table).

2. The amount of PA is determined by the employee's:

a. Salary;

b. Family size (divided into 6 groups) with separate rules dealing with family members who are away from the post for education;

c. The "post classification level" (e.g., 5%, 10% ... 160%); and,

d. The resulting DSSR § 920 Post Allowance Payment Table.

3. Determination Authority. The Post Allowance provisions of the instruction do not specify who has authority to decide if an employee is entitled to a post allowance. Accordingly, authority for this determination falls under the DOD CPM general grant of authority - "the authority to decide an employee's eligibility for an allowance ... is delegated to those officials with appointing authority who are responsible for administering the program and submitting the required reports. The authority may be redelegated." DOD 1400.25-M SC 1250.6.1.1 (Dec 1969).

4. Employee Eligibility. Employees must be "stationed outside continental United States or in Alaska whose rates of basic pay are fixed by statute ... ." 5 U.S.C. 941(a). The Post Allowance is payable to employees even though they may not be eligible for other allowances, e.g., LQA. Generally, the employee must be a full time employee. "Part-time, intermittent, and U.S. family member summer/winter hire employees are not eligible." DOD 1400.25-M "CPM" SC1250.5.1.2.1.

a. There are special rules for wage grade employees and DODDs educators. DOD 1400.25-M "CPM" SC1250.5.1.2.2 & .5.1.2.3.

b. Employees living on TQSA are ineligible for COLA. 5 U.S.C. 5924(1).

c. An employee entitled to a cost-of-living allowance under section 5924 may not be paid a 5941(a) allowance. 5 U.S.C. 5941(b).

5. Initiation & Termination of PA. An SF-1190 "Foreign Allowance Application, Grant and Report" is submitted to start or modify PA.

a. PA begins the date the employee is hired at the post if locally recruited, or when the employee arrives at the new post except that no PA is authorized as long as the employee or a family member is on TQSA. DSSR § 223.1.

b. For an employee who is transferring from the overseas post, the PA terminates when the employee or family members begin TQSA, DSSR § 224.1.a; or if there is no TQSA, the date the employee begins travel for the transfer or a combined leave and transfer order. DSSR § 224.1.b.

c. Eligibility for the Allowance Can Be Affected by Absences from the Post.

(1) Employee Without Family - Absence from Post on Duty Assignments (TAD/TDY).

(a) PA continues while the employee remains in the foreign country. DSSR § 225.1a.

(b) PA continues for short absences from the post (up to 30 calendar days) unless the approving officer determines the grant should not continue. DSSR § 225.1.b.

(c) PA is terminated for on the 31st day of absence from the country on duty. DSSR § 225.1.b.

(2) Employee With Family - Absence from Post on Duty Assignments (TAD/TDY).

(a) As long as family member remains in the country, the PA continues but at the rate appropriate for the reduced family size. DSSR § 225.2.

(b) The PA can continue when the entire family leaves the country (unless the approving officer determines otherwise) for absences up to 30 calendar days. DSSR § 225.2.a.

(c) PA is terminated on the 31st day of absence from the country by the employee and the employee's family. DSSR § 225.2.a.

(3) Employee on Leave Unrelated to Transfer.

(a) When the leave includes travel per diem allowance, including home leave travel with return to the post authorized, the PA terminates the date travel begins. When one or more family members remain at the post and the employee is required to continue the usual living expenses, the PA continues but at the appropriate lower family size. DSSR 224.2.a.

(b) PA is terminated on the 31st calendar day of absence from the post on travel orders which don't provide per diem. DSSR § 224.2b.

D. **Post Differential**. Where the "conditions of environment [outside CONUS or in Alaska] ... differ substantially from conditions of environment in the continental United States" 5 U.S.C. 5925(a), 5941(a)(1).

1. May not exceed 25% of base pay. 5 U.S.C. 5925(a), 5941(a).

2. May also be used for an employee "stationed in the United States who is on extended detail to a foreign area." 5 U.S.C. 5925(a).

3. Is not typically available for duty stations in Europe. Is paid in Bahrain.

E. **Overseas Quarters**. An employee who is a citizen of the United States permanently stationed in a foreign country may be furnished, without cost to the employee, "living quarters, including heat, fuel, and light," in a government owned or rented building. 5 U.S.C. 5912. The statute does not

provide a basis for claiming a quarters allowance independent of implementing regulations. *Aurich et al v. United States*, 786 F.2d 1126, 1128, 1986 U.S. App. Lexis 20033 (Fed. Cir. 1986) (Section 5912 "merely *permits* the Government to furnish housing under appropriate regulations; it does not *entitle* employees to housing." (emphasis in original)).

1. Government provided quarters are typically not available to DOD civil servants overseas.

F. **Living Quarters Allowance (LQA)**. 5 U.S.C. 5923(a)(2); DOD 1400.25-M SC 1250.5.1; DSSR § 031.1.

1. "A living quarters allowance for rent, heat, light, fuel, gas, electricity and water" is provided when government owned or rented quarters are not provided without charge to an employee in a foreign area. 5 U.S.C. 5923(a)(2).

   a. Initial Repairs, Alterations and Improvements to Privately Leased Residence - may only be paid under "unusual circumstances" and only if "approved in advance" and the "duration of the lease justify payment of the expenses by the government." 5 U.S.C. 5923(a)(3).

   b. Items not covered are garbage or trash pickup, telephone charges, TV services or taxes, cleaning, garden or lawn maintenance, storage, road taxes, or fees associated with participation in a utility tax avoidance program.

2. LQA is divided into Entitlement Groups. The lower the number of the group, the higher the maximum allowance.

   a. Group 4 - Pay Grades GS-1 through GS-9 & Certain Blue Collar Grades.

      (1) Employees who have 15 years of U.S. government service and are GS 7-9, WG 12-13, WL 10-11 or WS 1-10, may be placed in Group 3.

   b. Group 3 - Pay Grades GS-10 through GS-13.

   c. Group 2 - Pay Grades GS-14 and above.

3. Each Entitlement Group is Divided into Employees With and Without Family Member Rates.

a. Without Family Member Rates - employees who are single or unaccompanied get this rate.

b. Employees With 1 dependent (e.g., a spouse) at the overseas location qualify for the "with family" rate.

c. Employees With 2-3 dependents receive an additional 10% above the "with family" rate.

d. Employees With 4-5 dependents receive an additional 20% above the basic "with family" rate.

e. Employees with 6 or more dependents receive an additional 30% above the "with family" rate.

4. The maximum allowance or rate is the cap. LQA is the lesser of the cap or actual expenses.

5. Initiation of LQA Payments. File with the designated office (typically HRO) an SF-1190 "Foreign Allowance Application, Grant, and Report" and a DSSR 130 "LQA Annual/Interim Expenditures Worksheet", typically with a copy of the lease. At the same time, if the employee has been on TQSA, the employee needs to stop the TQSA.

   a Reconciliation. At some point in the tour, the employee will need to reconcile the initial estimate provided for the LQA with actual expenditures (the utilities are the variable).

6. "Shared Quarters" - The "Sin Tax". Employees sharing quarters with one more individuals who are not family members "may be reimbursed only for their portion of the total cost of the quarters." DOD1400.25-M SC 1250.5.1.1.3. In the example described, the member with LQA was sharing quarters with one non-family member. The "employee's fair portion of the total annual allowable expenses should be 50 percent." *Id.* Whether the non-family member was actually contributing 50% of the cost of the quarters was not a factor in the example. The employee must list the person(s) they are sharing living quarters with or subletting to on the SF 1190 "Foreign Allowances Application, Grant and Report". *Id.*

7. Purchasing Quarters Overseas - Personally Owned Quarters (POQ). LQA can be used to purchase property overseas. There is a "10-year cost recovery period for personally owned quarters." DOD 1400.25-M SC 1250.4.7. The annual amount of LQA is based on the purchase price or

appraised value of the property, converted to U.S. dollars at the exchange rate in effect at the time of the purchase. Employees who own, or are purchasing POQ, are not eligible for additional quarters allowances for renting, if the POQ is within the employee's local area of work. DOD1400.25-M SC 1250.5.1.1.4.

a. After the 10 year purchase period, the employee can continue to receive LQA for utilities only.

8. LQA for DODDS Educators. There are special LQA rules for DODDS educators at DOD1400.25-M SC 1250.5.1.1.5 *referencing* 20 U.S.C. 901-907.

9. Determining LQA Rates. For each FOCONUS location an annual report of rents paid etc., is due through the Service and DOD to the State Department which sets the new LQA rate. New rates will also be established where there has been a dramatic change in the exchange rate between the dollar and the local currency.

10. LQA Determination Authority. The DOD CPM doesn't specify a single authority to determine LQA. Rather, the CPM specifies which official has authority to grant waivers for the different criteria described in DSSR §§ 031.12b and 031.12c.

11. Granting LQA to State-Side Hires Is the Norm. Generally, economics dictate that only higher graded (GS-9 or above) positions are hired State-side; activities hiring applicants from the States have to pay PCS costs and typically provide LQA. Lower graded American are recruited overseas without PCS costs or LQA allowance and would be typically filled by dependents of sponsors or "tourist" hires (the latter only if allowed by the host nation). Or, if a lower graded position is difficult to fill with local American applicants, the job would likely be converted to a position for host-national employees. The only controversy occurs when an American employee in a lower graded position (say, a GS-6) begins drawing LQA.

12. Overseas Hires & LQA. The determination of whether an overseas hire is entitled to LQA under the DOD CPM is controlled by provisions of the DSSR § 031.12, as supplemented by the DOD CPM - yes, its circular. DOD 1400.25-M SC 1250.5.1.1.1 *referencing* DSSR § 031.1 (which includes § 031.12), *supplemented by* DOD1400.25-M SC 1250.5.1.1.2.

a. As related below, DSSR § 031.12(b) authorizes some flexibility for LQA determination; there is no similar provision allowing flexibility

for granting TA for locally hired U.S. citizens. In other words, it is less onerous for overseas hires to qualify for LQA than for a TA.

b. LQA may be granted to overseas hires under the following limited circumstances.

> a. the employee's actual overseas place of residence is fairly attributable to employment by the United States; **and**
>
> b. prior to appointment, the employee was recruited in the States by the US government (including the Armed Forces), an international organization in which the United States Government participates, or a foreign government, and has been in substantially continuous employment by such employer with a transportation agreement; **or**
>
> c. the overseas employee was required by the agency to move to another overseas area.
>
> DSSR § 031.12.

c. BUT: LQA is not available, even if the employee moves, "[i]f the employee is joining a spouse at a new duty station who is eligible for LQA. ... ." DOD 1400.25-M SC1250.5.1.1.2.7.

d. Requirement "a" (DSSR § 031.12.a) - The Employee's Actual Overseas Place of Residence.

(1) Full DSSR quote,:

> "a. the employee's actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his/her employment by the United States Government."

(2) The DOD CPM emphasizes that employees must meet the requirements of this DSSR § 031.12a. DOD 1400.25-M SC 1250.5.1.1.2.

(3) By "actual place of residence" the DSSR is referring to where the person is actually living, not their home of record or legal domicile.

(4) Generally, it means that the person is overseas for employment reasons - if the person was overseas for some other reason, then the LQA wouldn't be necessary to recruit the person.

(5) Determination Authority. The DOD CPM provision does not state who makes this determination or who could grant a waiver and for that matter, neither does the DSSR § 031.12.. Accordingly, the DOD CPM general provision for delegations would apply.

(a) If a head of agency determination is required, the authority is delegated to the Director, [DOD] Civilian Personnel Management Service (CPMS), who may redelegate the authority. DOD 1400.25-M SC 1250.6.1.3 (Dec 1996).

(b) If a head of agency determination is not required, then the DOD CPM delegates the authority "to those officials with appointing authority who are responsible for administering the program and submitting the required reports. The authority may be redelegated." DOD 1400.25-M SC 1250.6.1.1 (Dec 1996).

e. Requirement "b" (DSSR § 031.12.b) - substantially continuous overseas employment with the United States or a foreign government with the equivalent of a transportation agreement.

(1) The actual DSSR requirements are:

The applicant employee is overseas because s/he:

- was recruited in the United States or one of its possessions by:

(1) the United States Government, including its Armed Forces;

(2) a United States firm, organization, or interest;

(3) an international organization in which the United States Government participates; or

(4) a foreign government

- and has been in substantially continuous employment by such employer

- with provisions for return transportation to the United States or one of its possessions.

DSSR 031.12.b.

(2) Former military and civilian members "shall be considered to have 'substantially continuous employment' for up to 1 year form the date of separation or when transportation entitlement is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States" not counting unusual cases such as the early return of a dependent. DOD 1400.25-M SC 1250.5.1.1.2.1.

(3) Waiver. The DSSR allows this provision to be waived "upon determination that unusual circumstances in an individual case justify such action." DSSR § 031.12. DOD however, places limits on the waiver. In other words, it is possible to give LQA to a local hire overseas applicant even if they were not originally recruited in the United States, with substantially continuous employment, with an enumerated employer, with provision for return to the United States, when "unusual circumstances in an individual case" exist.

(4) DOD Limitations on Waiver. While the State Department exemption could apply to any local candidate where there are "unusual circumstances" the DOD Civilian Personnel Manual, DOD 1400.25-M SC1250.5.1.1.2.2, specifically limit this waiver to the following circumstances:

.1 The sponsoring spouse dies.

.2 The sponsoring spouse becomes incapable of continued employment with the government.

.3 The couple divorces or separates (either by initiating legal action to dissolve the marriage or "one separates from bed and board short of applying for a divorce."

.4 "Sponsoring spouse left the post or area permanently."

.5 Spouses could not maintain a common dwelling due to the relocation of either spouse's work place.

.6 The locally hired employee encumbers a position designated as Emergency Essential (EE) iaw DOD Directive 1404.10.

- The ability to be paid the LQA allowance is effective only for the period during which the EE crisis exists. DOD 1400.25-M SC1250.5.1.1.2.2.

(a) Plus, in situations .1 - .5, the locally hired employee must have entered the country where the foreign post is located as the spouse of a sponsor eligible for LQA. DOD 1400.25-M SC1250.5.1.1.2.2.

(b) And, waivers for reasons .1 - .5 "shall last no longer than one year from the date eligibility is established" unless further extended by the appropriate Major Command. DOD 1400.25-M SC1250.5.1.1.2.2.2.

(c) And when the employee/applicant under consideration for the LQA accompanied or followed the sponsoring spouse to the foreign area and still resides with the spouse, then waiver of the DSSR 031.12b (requiring continuous overseas employment with the US or a foreign government) will not be made except where the sponsoring spouse becomes incapable of working for the government. DOD 1400.25-M SC1250.5.1.1.2.3 *referencing* SC 1250.5.1.1.2.2.2.

(5) Extent of Limitation on Giving LQA to Overseas Spouses. Read in isolation, one of the paragraphs discussing the LQA waiver seems to prohibit dependent spouses who are still residing overseas with their sponsor from qualifying for LQA anywhere in the world. But reading the provision in its context shows this is not the case - prohibition only applies to local hires, that is, the LQA restriction only applies to the overseas country where the couple is stationed.

(a) The provision states: "Except ... [where the sponsoring spouse is physically or mentally incapable of employment, the] **waiver ... will not be made for a married employee who accompanied or followed his or her spouse to a**

foreign area and still resides with that spouse." DOD 1400.25-M SC 1250.5.1.1.2.3 (emphasis added).

(b) The provision seems to state that if dependent spouse was in "a foreign area," and that would be any foreign area, and still resides with the spouse, then she cannot qualify for LQA, presumably at all other overseas locations.

(c) Thus, for example, what of a couple in Spain where the military sponsor was retiring and the spouse was applying for a position in Italy and the military sponsor was still capable of employment? Could a hiring activity in Italy grant LQA if the dependent spouse was hired, given she had accompanied her spouse to a foreign area and still resides with the spouse? The answer should be that LQA can be granted because the restrictions in the waiver only apply to "locally hired" applicants and "locally hired refers to the country in which the [hiring] foreign post is located." DOD 1400.25-M SC 1250.3.4.

(d) First, the policy provision of the CPM makes relates that if "a person is already living in **the** foreign area," not any foreign area but **the** foreign area where the vacancy exists, then inducements such as LQA are "normally unnecessary." DOD 1400.25-M SC 1250.4.1 (emphasis added). So the policy concerns do not apply to applicants from around the globe but are limited to granting inducements such as LQA to applicants within the foreign country. Next, turning the Civilian Personnel Manual's discussion of the waiver itself, it states, "Officials ... may waive [the] requirements for **locally hired** U.S. citizen employees" and then goes on to discuss the DOD limits on that waiver, the sponsoring spouse dies etc. DOD 1400.25-M SC 1250.5.1.1.2.2 (emphasis added). Thus the subsequent constriction to the exceptions on the DOD limits to the State Department waiver only exist in the context of a "locally hired U.S. citizen," that is, a spouse applicant in the same country where the vacancy exists.

Note: Whether this analysis would be accepted by a determination authority in an actual situation is unknown.

(e) This interpretation is strengthened by the fact that if read in isolation, the provision leads to ridiculous results. The

provision is that wavier "will not be made for a married employee who accompanied or followed his or her spouse to a foreign area and still resides with the spouse." DOD 1400.25 SC 1250.5.1.1.2.3. Note that the term used here is "spouse" not "sponsoring spouse" So, literally it would apply, say to a civilian sponsor who has LQA whose dependent spouse has accompanied the sponsor to the foreign area. And having completed their overseas tour, the sponsor would be ineligible for LQA at any other overseas position world-wide if the sponsor still resides with the dependent spouse.

(3) Determination Authority for Waiver. The DOD Civilian Personnel Manual delegates authority to the Secretaries of the military Departments among others. DOD 1400.25-M SC 1250.6.1.2. The CPM further provides that if the Major Command (MAJCOM) recommends approval of a waiver that it go to the DOD Component Headquarters, e.g., to Navy Headquarters. But that the Component Headquarters could redelegate authority back to the MAJCOM. DOD 1400.25-M SC 1250.5.1.1.2.2. The CPM also relates that the authority to decide an employee's eligibility for an allowance is "delegated to those officials with appointing authority who are responsible for administering the program and submitting the required reports. This authority may be redelegated." DOD 1400.25-M SC 1250.5.1.1.2.2 *referencing* SC 1250.6.1.1.

(7) When a waiver is granted, the "effective date of the LQA approval will be the date eligibility is established by the approving official or the date quarters are occupied, whichever is later." DOD 1400.25-M SC1250.5.1.1.2.5.

(8) Example Where LQA Granted to Local Hire But TA Denied. Using the flexibility provided by DSSR § 031.12, the Navy's Office of the Assistant Secretary of the Navy (Manpower & Reserve Affairs) (ASN(M&RA)) granted LQA for an overseas local hire who was the dependent spouse of a retiring military member under the following circumstances. Granting the LQA was a recruiting incentive (the employee would not have taken the position without it and would have returned to the States), for a GS-14 unique position (there was only one at the command) that was normally filled by recruitment from the United States; recruiting the candidate saved the Navy two moves (returning the family to the United States and then

bringing another candidate), and the candidate was the only applicant in the overseas area. At the same time, the lack of flexibility in the JTR prohibited a TA because he had accompanied his military spouse to the overseas area, the now retired military spouse retained return benefits to the United States, and the family did not meet any of the requirements under JTR C4002-B2(4) (the sponsoring retired military spouse had not left the service due to a physical or mental incapability, had not died, had remained in the local area and the couple had not divorced or separated). Letter, From OASN(M&RA) to Commanding Officer, NRCC Naples, Italy, "Living Quarters Allowance Waiver Request" (August 22, 2000).

f. Requirement "c" (DSSR § 031.12.c) - Granting an LQA after a move from an overseas location to a second overseas location.

(1) The DSSR 031.12 provision:

> "c. as a condition of employment by a Government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency."

As explained in the DOD Civilian Personnel Manual, requirement c, i.e., the granting of LQA, "shall be applied when management requests that an employee not now eligible for LQA relocate to another area. A management request that an employee relocate is considered a management-generated action." DOD 1400.25-M SC1250.5.1.1.2.6.

(2) Note: This requires more than a selection action from one overseas position to another overseas position. Rather, the employee must have been "**required** ... to move," for example (and probably, that is) the employee's billet is moved from one overseas location to a second overseas location (with the second location outside the commuting area of the first location).

(a) LQA then is unlike a TA where a move from one FOCONUS PDS to another FOCONUS PDS is grounds for a TA.

(b) Thus it is possible for an employee without a TA but having LQA in a FOCONUS PDS #1 who's position is transferred to another FOCONUS PDS #2 will retain LQA

entitlement and pick up a TA entitlement, while an employee at FOCONUS PDS #1 without LQA or TA who applies for and is selected for a position in PDS #2, will get a TA but not LQA at PDS #2.

(c) "A move through a voluntary reassignment action is not considered a management-generated action" and thus LQA would not be available at the new location. DOD 1400.25-M SC1250.5.1.1.2.6.

(d) The DOD CPM applies the following test to see if an overseas move to another overseas location qualifies the employee for LQA at the new location. If the answer is yes to SC 1250.5.1.1.2.6.1, and .2 or .3 (below) applies, then LQA can be granted.

.1 Will employment be ended if the employee fails to accept relocation?

.2 Is the relocation caused by a management-generated action?

.3 Must management request an employee not now in receipt of LQA to relocate to another area?

DOD 1400.25-M SC1250.5.1.1.2.7.

(i) With regard to the first requirement, even if the employment wouldn't end if the employee refuses to move, "the DoD Component may approve LQA if a determination is made that there is no choice but to move the employee for official reasons (e.g., mobility is inherent in the functional area)." DOD 1400.25-M SC1250.5.1.1.2.7.

(ii) With regard to the third requirement, "Selecting a person to be relocated is based on regulatory guidance, leaving management little option to recruit a new employee or select an employee receiving LQA." DOD 1400.25-M SC1250.5.1.1.2.7.

(e) "as a condition of employment" means a that if the condition, "if not fulfilled, results in failure to gain or retain employment." DOD 1400.25-M SC1250.5.1.1.2.6.

(f) "another area" - "if an employee's new duty station is with the local area of work of the previously established residence, no LQA will be authorized." DOD 1400.25-M SC1250.5.1.1.2.7.

g. For NAF to appropriated fund transfers, when the NAF employee was "eligible for [LQA] and related allowances upon their initial hire" and received the allowance for a year, upon transfer to an appropriated fund position, they continue to be eligible for the allowances. DOD 1400.25-M SC1250.5.1.1.2.9 *citing Angelo Raffin & Air Force*, CG B-184972.

h. Determination Authority. "Head of agency" for DOD means the decision is made by the "appropriate Major Command." DOD 1400.25-M SC 1250.5.1.1.2.6. This authority may be redelegated to officials with appointing authority who are responsible for administering the program and submitting the required reports (which may in turn, be further redelegated). DOD 1400.25-M SC 1250.5.1.1.2.6 *referencing* SC 1250.6.1.1 (Dec 1996).

(1) Where two Major Commands or two Military Departments are involved in the move, "the gaining command will make the final determination [on whether LQA will be given]. The losing command, however, shall request an advance finding from the gaining command to advise the employee as to LQA benefit as a result of the movement." DOD 1400.25-M SC1250.5.1.1.2.8.

G. **Education Allowance for Dependents**. There is an extensive set of rules for an "education allowance or payment of travel costs" for "extraordinary and necessary expenses ... incurred ... in providing adequate education for ... dependents" of overseas employees at 5 U.S.C. 5924(4); DOD 1400.25-M SC 1250.5.1.3.

H. **Foreign Currency Appreciation Allowances**. 5 U.S.C. 5943. This allowance exists in statute. How and whether it is paid is unknown. This provision is not cited in the JTR.

1. There is an "arrangement approved by the President on July 27, 1933," providing "for the conversion into foreign currency of checks and drafts of employees and members of the uniformed services for pay and expenses" for annual appropriations. 5 U.S.C. 5943(b).

2. Where the July 27, 1933, arrangement is not used, agencies may meet losses sustained by employees and members of the uniformed services while serving in a foreign country due to the appreciation of foreign currency in its relation to the American dollar. 5 U.S.C. 5943(a) & (c). Allowances and expenditures under this section are not subject to income taxes. 5 U.S.C. 5942 (a).

3. The President shall report annually to Congress all expenditures made under this section. 5 U.S.C. 5943(d).

I. **Special Compensatory Time-Off**. In lieu of overtime, "on request of an employee serving in a foreign area" special comp time (my phrase) is available either where (1) the post is "isolated" and the employee is "performing functions required to be maintained on a substantially continuous basis" or (2) the employee is at a post "in a locality that customarily observes irregular hours or other special conditions." 5 U.S.C. 5926(a). The limitation is that the comp time earned may only be used "while the employee is assigned" to the post where it was earned and if not used, forfeited when reassigned. 5 U.S.C. 5926(b).

J. **Increase Accumulation of 45 Days Annual Leave**. American civil servants are normally limited to 30 days (240 hours) unused accumulated annual leave. 5 U.S.C. 6304(a).

1. This limit is raised to 45 days (360 hours) for:

a. Individuals directly recruited (e.g., a hire or transfer) in the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment. 5 U.S.C. 6304(b)(1).

b. Local hires with a Transportation Agreement. Employees originally recruited from the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment, who have been in "substantially continuous employment" by the United States, its interests, international organizations, or foreign governments, whose conditions of employment provide for their return transportation to the United States or its territories or possessions including the Commonwealth of Puerto Rico. 5 U.S.C. 6304(b)(2)(A).

(1) With respect to LQA allowance, the DOD Civilian Personnel Manual relates that former military and civilian members "shall be considered to have 'substantially continuous employment' for up to 1 year form the date of separation or when transportation entitlement is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States" not counting unusual cases such as the early return of a dependent. DOD 1400.25-M SC 1250.5.1.1.2.1.

c. Local "Tourist" Hires (my term), who were temporarily absent (for the purpose of travel or formal study) from their place of residence in the United States, or its territories or possessions including the Commonwealth of Puerto Rico, and who, during the temporary absence, have maintained their U.S. residence. 5 U.S.C. 6304(b)(2)(B).

d. Military members who are discharged from service **to accept employment with a federal agency** and who are not normally residents of the area concerned. 5 U.S.C. 6304(b)(3).

Warning: It is important that overseas military members who are separating or retiring keep contemporaneous records of their attempts to gain civil service employment in order to show that they "discharged from the service ... to accept employment with an agency" (5 U.S.C. 6304(b)(3)) in the event their entitlement to 360 hours of annual leave is called into question.

2. Individuals who don't meet these requirements are limited to accumulating 30 days of annul leave.

3. Use of Accumulated Leave. The employee retains the excess accumulation until used. The excess amount of annual leave will be reduced when the amount of annual leave the employee used during the preceding year in excess of the amount which accrued during that year. 5 U.S.C. 6304(c).

4. Restoration of Excess Leave. Congress anticipated the need to have leave restored both because employees would not be able to take leave on time or due to errors in accounting for leave.

a. Per 5 U.S.C. 6304(d)(1), annual leave lost can be restored when:

- administrative error resulted in a loss of annual leave otherwise accruable;

- exigencies of agency business when the annual leave was scheduled in advance; or

- sickness of the employee when the annual leave was scheduled in advance.

b. By statutory definition, "exigencies" exist when a DOD emergency essential employee (designated under 10 U.S.C. 1580) in a combat zone (as used section 112(c)(2) of the Internal Revenue Code of 1986) loses leave by reason of such service regardless of whether such leave was scheduled. 5 U.S.C. 6304(d)(4).

c. Restored excess leave will be put in a separate leave account for use by the employee within the time limits prescribed by the Office of Personnel Management (OPM). Per 5 U.S.C. 6304(d)(2), unused leave still available to the employee shall be included in the lump-sum payment under section 5551 (accumulated leave on separation) or 5552(1) (accumulated leave when entering active duty) but may not be retained to the credit of the employee under 5552(2) when the employee enters active duty.

XVI. **HOME LEAVE & RENEWAL AGREEMENT TRAVEL (RAT)**. There is no requirement that home leave be used for RAT, but the limitations on using each means that home leave is typically spent on RAT, although home leave can be used throughout the United States, whereas RAT is limited to the employee's residence or one alternate location.

A. **Home Leave**. 5 U.S.C. 6305.

1. Available after 24 months of continuous service outside the United States (or a shorter period if the employee's assignment is terminated for the convenience of the Government). 5 U.S.C. 6305(a).

2. Accumulated at a rate not to exceed 1 week for each 4 months of that service. 5 U.S.C. 6305(a). Accumulates without regard to the limitations on annual leave in section 6304(b). 5 U.S.C. 6305(a)(2). May not be made the basis for terminal leave or for a lump-sum payment. 5 U.S.C. 6305(a)(3).

3. For use in the United States, or if the employee's place of residence is outside the area of employment, for use in the territories or possessions of the U.S. including the Commonwealth of Puerto Rico. 5 U.S.C. 6305(a)(1);

4. Exemption From Use of Annual Leave In Conjunction with Travel Home. Annual leave does not have to be taken for "time actually and necessarily occupied in going to or from a post of duty and time necessarily occupied awaiting transportation." 5 U.S.C. 6303(d).

   a. The statute limits this travel exemption to "one period of leave in a prescribed tour of duty at a post outside the United States ... ." 5 U.S.C. 6303(d).

   b. Applies to:

      (1) An American civil servant (per 5 U.S.C. 6303(d)(1), an employee to whom 5 U.S.C. 6304(b) applies);

      (2) Whose post of duty is outside the United States 5 U.S.C. 6303(d)(2); and,

      (3) Who returns on leave to the United States, its territories or possessions including Puerto Rico. For those employees who work outside the United States but in the territories or possessions including Puerto Rico, the leave must be taken outside the area of employment. 5 U.S.C. 6303(d)(3)

B. **Extension of Tours**. Once the initial overseas tour has been served, ALL subsequent continuous extensions of the tour are always extension tours, typically of two years in duration, even if the employee transfers from one F-OCONUS PDS to another F-OCONUS PDS. For example, take an employee with nine years of F-OCONUS service where the initial tour is for three years and extensions are for two years, the employee would have served tours of "3 + 2 + 2 + 2." It would not have mattered if the employee moved to another PDS during the second extension - neither the move nor the change in jobs restarts the initial 3-year tour clock.

C. **Renewal Transportation Agreements**. 5 U.S.C. 5728(a); JTR C4003.

1. Statutory Authority. When an employee has satisfactorily completes a post of duty outside the 50 states, "an agency shall pay" for the expenses

of round trip travel of an employee and transportation of his immediate family, but not HHG, from his post of duty to his actual place of residence, and take leave before serving another tour of duty at the same or another post of duty outside the 50 States, under a new written agreement made before departing from the post of duty. 5 U.S.C. 5728(a).

2. An employee is entitled to home leave travel at the end of an initial 36-month period, and again every 24 months thereafter, provided the employee meets all other requirements of 5 U.S.C. 5728. *Brown v. United States,* 3 Cl Ct 31 (1983).

3. Eligibility. Renewal agreements are negotiated with employees who have satisfactorily met the conditions of the initial TA JTR C4003-A. Additionally, the employee must have:

   a. Have maintained an "acceptable actual residence outside the geographical locality of employment." JTR C4003-A.

      (1) The TA is recorded on a DD Form 1617. Block G asks for "Actual Residence at Time of Appointment (To be determined at time of initial agreement)." The address to put here is NOT where you are actually living overseas, but your home of record or legal residence - the (typically) CONUS destination the government is required to return you to after the end of your OCONUS tour.

   b. Satisfactorily completed the prescribed tour of duty at the PDS the employee is departing.

   c. Entered into a written TA for another tour of duty at an OCONUS PDS. The new TA should cover costs incident to travel to the employee's actual residence or alternate location and return to OCONUS; and any additional costs to be paid by the Government as a result of the employees transfer to another OCONUS PDS at the time of the RAT. JTR C5503.

   d. Prohibitions.

      (1) The JTR generally prohibits negotiating a renewal agreement with locally hired married employees and unmarried dependents under 21 years of age. JTR C4003-C.

(2) As a general rule, persons already in the overseas area when hired by the government as a local hire, are not entitled to RAT. Regulations establishing point of hire (i.e., CONUS v. OCONUS) as the trigger to entitlement to RAT are reasonable. *Acker v. United States*, 6 Cl. Ct. 503 (1984).

4. Remember, "A renewal agreement establishes eligibility for round trip travel and transportation allowances for an employee and dependents for the purpose of taking leave between consecutive periods of OCONUS employment. **A renew agreement does not establish any HHG transportation authority**." JTR C4001.A (emphasis added).

5. Residence & RAT.

a. The statutory purpose of RAT is to allow the employee to return to his State-side residence contemporaneous with a follow-on OCONUS tour. Consequently, "the employee, and the employee's dependents must spend the majority of the RAT time in the CONUS or that non-foreign OCONUS location for RAT travel to be authorized." JTR C5536.C. GSA says this a little differently giving the employee on RAT greater discretion as to destination. "If your [the employee's] actual place of residence is located in the U.S., you and your family must spend a substantial amount of time in the U.S. in order to receive reimbursement." 41 C.F.R. 302-3.220 note.

b. The employee generally needs to have an actual residence (a domicile) in the States to return to.

(1) It is for the agency to determine the employee's "actual residence" and the Comptroller General will not question any reasonable determination by the agency. *Michael Newman*, B-257861 (Comp. Gen. Feb. 15, 1995).

(2) Appointee who is an actual resident of a Germany at the time of appointment is not entitled to RAT. Actual residence is actual physical presence and location for extended period of time and differs from legal residence. The fact that the employee has paid taxes in the United States and maintained voting eligibility during actual residence abroad does not preclude a finding of that the overseas residence is the actual residence. *Brown v. United States*, 741 F.2d 1374 (Fed. Cir. 1984). (Note: Given plaintiff was "an actual resident of Germany" plaintiff was fortunate to be employed at all given the restriction in the

NATO SOFA against hiring persons into the U.S. civilian component who are ordinarily resident.)

(3) BUT, by regulation the employee may do RAT to the "country of the employee's actual residence." JTR C5536.A.1.b. RAT is not authorized however, when the employee is "merely routed through the country of actual residence en route to another country." JTR C5536D.2 (presumably the "other country" is not to the subsequent F-OCONUS PDS).

c. Alternative Destination. RAT is authorized to an alternative location in a CONUS or NF-OCONUS location. C5536.A1.a.

(1) The alternative destination should be the official travel destination and approved before hand but may be approved after the fact. JTR C5536.A.2, C5536.E.

(2) RAT is not authorized as an alternative destination when the employee "[t]ravels to various points for personal reasons (e.g., a 'travel tour')." JTR C5536.D.3.

(3) Reimbursement to the alternative destination "must not exceed the amount allowed for transportation along a usually traveled route between the PDS and the actual residence." JTR C5538.F.

6. "RAT authorization is not cumulative from one period of service to another if not used." JTR C5521.

7. Denial of RAT Travel. Agencies cannot generally deny RAT to an eligible employee. JTR C5515.B.1. Funding RAT is mandatory on agency, not discretionary; and an agency cannot defeat RAT entitlement by refusing to negotiate with the employee for it. 63 Comp. Gen. 563 (1984). The JTR lists the following reasons for denying RAT, all of which are inherent in the RAT statute (successful completion of an OCONUS tour with assignment to a follow-on OCONUS tour). "RAT may be denied under JTR C5515.A., in the following circumstances. The employee:

1. Is being processed for separation;

2. Is going to be involved in a RIF;

3. Has a removal action pending;

4. Has been assigned to a U.S. position; or

5. Is to be reassigned to a CONUS position in connection with rotation on a similar program that precludes a required period of service completion under a renewal agreement.

8. Per Diem & Expenses Covered by RAT Travel.

a. Authorized Allowances. JTR C5010 Table 8.

(1) Relocation Allowances the Agency Must Pay:

(a) Transportation of employee and immediate family. JTR Vol 2, Chapt 5, Part A.

(b) Per diem for employee only. JTR C5530.

(2) Relocation Allowances the Agency Has Discretion to Pay For:

(a) HHG shipment to the new PDS. JTR C5539.

(b) Dependent Transportation to the new PDS. JTR C5518.

b. "An employee is authorized per diem during the allowable RAT travel periods between the OCONUS PDS and the authorized RAT destination." No per diem is authorized for dependents when the follow-on tour is at the same PDS. When the follow-on tour is a different OCONUS PDS, dependent per diem allowed is limited to the constructed time between the old and new PDS. JTR C5530. No other expenses associated with a PCS are allowed for RAT. 41 C.F.R. 302-3.101 Table E.

Comment: That family members don't get per diem is a good example of how minor and seemingly inconsequential differences in statutory language lead to major distinctions in allowances. The statute provides for payment of "expenses of round-trip travel of an employee, and the transportation of his immediate family" to the United States. 5 U.S.C. 5728(a). Here, "expenses of round-trip travel" for employee is deemed to include not just the tickets but per diem as well, while the phrase "and transportation of his immediate family" is parsed to mean that reimbursement of the travel expenses of the family members is limited to the cost of their actual transport. The family members would be entitled to per diem if the statute had read instead, "the

employee and dependents are entitled to round-trip travel and transportation expenses."

c. The employee and dependents "are authorized transportation (including transportation to and from common carrier terminals) from the OCONUS PDS to the employee's actual residence at the time of assignment to the OCONUS PDS." JTR C5512. On the trip back overseas, transportation is also authorized from the actual residence to the OCONUS PDS with limits when the new PDS is in Alaska or Hawaii. JTR C5512.

9. Scheduling Limits on RAT. RAT ordinarily is performed between OCONUS tours. JTR C5509.B.1.c.

a. Going on RAT Early. RAT may be scheduled up to 6 months before the end of the initial 36 month tour provided the renewal agreement is for duty in a 24-month tour area. JTR C4005-C.1.b.

b. Going on RAT Later. RAT may be performed after the beginning of the follow-on OCONUS tour subject to leave being granted IAW personnel regulations and "when authorized/approved by the employee's OCONUS commander." JTR 5509.B.1.c *referencing* Comp. Gen. B-232179 (Oct., 6, 1989). The JTR provisions distinguish between RAT being delayed at management's request and at the employees request but the bottom line is that the RAT has to be completed not later than 1 year before the employee's follow-on OCONUS tour is completed.

(1) Delay at Management's Request. Management may request an employee to delay RAT by extending the initial tour (or tour then in effect) not to exceed 90 days if:

a. The employee is engaged on a project that is scheduled for completion within a reasonable time;

b. There is a temporary personnel shortage; or,

c. For other good reasons.

But, "[s]ufficient time must remain in the employee's renewal agreement tour ... to serve at least 12 months upon return to the OCONUS PDS." JTR C5509.B2.

(2) Delay at the Employee's Request. An employee may request an extension of the initial tour (or tour then in effect) to permit leave scheduling to accommodate personal/job related reasons acceptable to and permitted by the OCONUS commander concerned (see par. C4005-C1). In this case, the employee's tour after performing RAT and returning to the OCONUS is the greater of:

a. The renewal agreement tour for the PDS concerned, decreased by the number of days the initial tour was extended; or

b. 12 months.

JTR C5509.B.3.

(3) Also, whether for a management requested delay or at the employees request, a delay in RAT should not be authorized if the resulting extended tour, or the requirement to serve 12 months following return from RAT, requires the employee to remain OCONUS "beyond the 5- (or any other) year limit ... unless the employee is not affected by, or has been released from, the 5- (or other-) year ... limitation." JTR C5509.B.4.

10. The purpose of RAT is to allow an employee stationed OCONUS to return to the United States between overseas tours of duty. Payment for RAT is not available for the dependents unless the employee himself returns to the U.S. for the purpose of taking leave. *Jacqueline G. Sablan*, 15961-TRAV (GSBCA Apr 15, 2003).

11. Dependent's could accompany employee on temporary duty assignment in the US with employee taking RAT at a later time notwithstanding general rule that federal employees have no entitlement to concurrent travel of dependents while on TDY. 65 Comp. Gen. 213 (1986).

XVII. ORDINARY RETURN FROM ASSIGNMENT OVERSEAS.

A. **Authorized Allowances**. JTR C5010 Table 6.

1. Relocation Allowances the Agency Must Pay. JTR C5010 Table 6 Column 1.

a. Transportation and per diem for employee and immediate family, JTR Vol 2, Chap. 5, Part A;

b. Miscellaneous expense allowance, JTR Vol 2, Chap. 5, Part G;

c. Sale and purchase of residence transaction expenses or lease termination expenses when being returned from FOCONUS is transferred to a different CONUS or non-foreign CONUS station from which they left to go overseas. JTR Vol 2, Chap. 14.

d. Transportation & temporary storage of HHG, JTR Vol 2, Chap. 5, Part D;

e. Non-temporary (extended) storage of HHG when assigned to a designated isolated official station in CONUS, JTR Vol 2, C5195-A;

f. Relocation income tax allowance (RITA), JTR Vol 2, Chap. 16.

2. Relocation Allowances the Agency Has Discretion to Pay For. JTR C5010 Table 6 Column 1.

a. Shipment of a privately owned vehicle, JTR Vol 2, Chap. 5, Part E;

b. Temporary Quarters Subsistence Allowance (TQSA) under DSSR § 120 may be authorized for temporary quarters occupied at a foreign OCONUS PDS before departure from that PDS while TQSE may be authorized for temporary quarters occupied in CONUS.

B. **TQSA Upon Departure from PDS**.

1. Purpose of TQSA. TQSA is intended to assist in covering the average cost of adequate but not elaborate or unnecessarily expensive accommodations in a hotel, pension, or other transient-type quarters at the post of assignment, plus reasonable meal and laundry expenses preceding final departure from the post. DSSR § 122.1; JTR C1003.

2. Paid for up to 30 days immediately before final departure from the OCONUS post after "necessary evacuation of residence quarters." 5 U.S.C. 5923(a)(1)(B); DSSR § 121.b. This period may be extended for not more than 60 additional days if it is determined "that there are compelling reasons beyond the control of the employee ... ." 5 U.S.C. 5923(b); DSSR § 122.2.

3. Initiation of TQSA. TQSA upon departure from the PDS begins "the date expenditures for temporary lodging are first incurred following the necessary vacating of residence quarters." The agency head or designee may authorize a 5-day overlap of LQA and TQSA if the "agency head or designee determines that it is necessary for the employee to vacate existing quarters in order to meet lease requirements for cleaning and repair." DSSR § 124.1.b.

4. TQSA Rates on Departure.

   a. For the First 30 days. The initial occupant gets 75% of per diem, for each additional family member age 12 or over gets 50%, and those under age 12 get 40%. DSSR § 124.31.

   b. For the Second 30 Days (only allowed due to compelling reasons), the initial occupant gets 65% of per diem, for each additional family member age 12 or over gets 45%, and those under age 12 get 35%. DSSR § 124.32(1).

   c. For the Third 30 Days (only allowed due to compelling reasons), the initial occupant gets 55% of per diem, for each additional family member age 12 or over gets 40%, and those under age 12 get 30%. DSSR § 124.32(2).

   d. As with the rates upon arrival, if the employee occupies no cost quarters, the allowance drops to actual meal, laundry and dry cleaning expenses at the maximum rate for the first 30 days. DSSR § 124.33. And where the temporary lodging facilities are limited and very expensive, the rate payable for the first 30 days can be maintained. DSSR § 124.34.

5. Employees living on TQSA are not eligible for COLA. 5 U.S.C. 5924(1). Nor is an employee on TQSA eligible for a Post Allowance. DSSR § 127.

6. Submit an SF-1190 and a TQSA Worksheet DSSR 120. Hotel receipts are required along with a certification for meals and laundry expenses. Receipts may be required for individual meals over a certain amount.

C. **Transportation Expenses**.

1. On return from OCONUS, an agency may pay "these expenses" (travel and transportation expenses employee and employee's immediate family,

HHG and personal effects) from employee's OCONUS post of duty to his place of actual residence at the time of assignment to duty OCONUS. 5 U.S.C. 5722(a)(2). The return expenses can only be paid:

- After the individual employed in a DOD teaching position has served for a minimum of one school year. 5 U.S.C. 5722(c)(2) (except if a substitute);

- Or if otherwise employed, if the individual has served "not less than one nor more than 3 years prescribed in advance by the head of the agency." 5 U.S.C. 5722(c)(1).

"[U]nless separated for reasons beyond his control which are acceptable to the agency concerned. These expenses are payable whether the separation is for Government purposes or for personal convenience." 5 U.S.C. 5722(c).

2. Where the employee fails to stay at the overseas post for the minimum time in the service agreement, agency may pay for transportation expenses only when the employee leaves for reasons beyond the control of the employee and the reasons are acceptable to the agency. *Ms. Roberta B.*, 15320-RELO Aug 3, 2001.

   a. Determination of whether to release employee from service abroad early is a matter of agency discretion. That determination will not be overturned by GSBCA unless the agency determination was arbitrary and capricious. *Ms. Roberta B.*, 15320-RELO (GSBCA Aug 3, 2001).

D. **Return Rights**.

1. Return Rights As to Position. Competitive service employees assigned to overseas locations have "the right to return to a position in the United States" if they "satisfactorily complete[ ] such duty" and apply "not later than 30 days after ... completion of such duty, for the right to return ... ." 10 U.S.C. 1586(b)(2) & (3). The Secretary of the department concerned may waive these requirements (but not that performance be in the competitive service) "in those cases in which application of such [requirements] ... would be against equity and good conscience or against the public interest." 10 U.S.C. 1586(b). An employee removed upon completion of the overseas assignment because of his failure to exercise his reemployment rights was afforded all the due process required and was not deprived of property rights in violation of the Constitution.

Harris v. United States, 640 F.2d 1309 (Ct.Cl. 1981), *cert. denied*, 454 U.S. 820.

2. Return Rights as to Pay. Limited to the competitive service, "The right to return to a position in the United States ... shall be without reduction in the seniority, status, and tenure held by the employee immediately before his assignment to duty outside the United States ... ." 10 U.S.C. 1586(c). "Each employee who is placed in a position" upon return to the United States, "shall be paid at a rate of basic pay which is not less than the rate of basic pay to which he would have been entitled if had not been assigned to duty outside the United States." 10 U.S.C. 1586(d). The implementing DOD CPM explicitly addresses step increases, "the employee is entitled to a rate of basic pay not less than the rate to which he or she would have been entitled ... including any applicable within-grade increase(s)." DOD 1400.25-M, SC 531.2.3 (USD(P&R) Dec 1996, change 1, July 25, 1997).

   a. The only exception is where a RIF is required upon return to the States. 10 U.S.C. 1586(d) *referencing* (c)(5). The employee is to be placed in the position held immediately before the overseas assignment. If such position no longer exists, or with the employee's consent, the employee can be returned to another State-side position. 10 U.S.C. 1586(c)(1) & (2). A challenge to Army regulations on reemployment rights was denied. *Harris v. United States* , 640 F.2d 1309 (Ct. Cl. 1981), *cert denied*, 454 U.S. 820.

   b. The fact than employee sought out the overseas assignment does not affect his return rights. *Dancy v. United States*, 668 F.2d 1224 (Ct.Cl. 1982).

   c. Employees who go to a higher grade overseas have no MSPB appeal rights to contest their being "demoted" when they return to their State-side position. *Fromer v. Dept. of Defense*, 29 M.S.P.R. 481 (1985); *Walton v. Dept. of Navy*, 42 M.S.P.R. 244 (1989).

3. Employees displaced by a returning employee are to be placed in another position at the same grade in the same geographic area. If the employee cannot be so placed, the employee can be reassigned to another position or separated. 10 U.S.C. 1586(e). The displaced employee does not have standing to challenge his being bumped. *Coleman v. Dept. of Navy*, 24 M.S.P.R. 426 (1984).

4. Positions in Alaska and Hawaii count as overseas assignments. 10 U.S.C. 1586(f); E.O. 10895 (Nov. 25, 1960, 25 Fed. Reg. 12165, *found at* 10 U.S.C.A. 1586 note (West 1998).

E. **Pay Retention Upon Return From Overseas**. Pay retention will be extended when an employee is reduced in grade upon return from an overseas assignment in accordance with the terms of a preestablished agreement. Memorandum from DASD(CPP), "Subj: Grade and Pay Retention" ¶b(3) (Feb 13, 1987), *reprinted in* OCPMINST 12536.1 (Supplement to FPM 990-2).

1. This includes employees who are:

   a. released early from their TA early due to a management initiated action, or

   b. employees who have served more than one year under a TA and who return from overseas early because of compelling personal reasons of a humanitarian or compassionate nature, such as may involve physical or mental health or circumstances over which the employee has no control.

2. Also included are nondisplaced overseas employees with no obligation to return who are covered by Part I, Chapter 6, ¶ C3c of DOD 1400.20-1-M "DOD Program for Stability of Civilian Employment."

XVIII. MOVEMENT BETWEEN FOREIGN AREAS.

A. **Authorized Allowances**. JTR C5010 Table 7.

1. Relocation Allowances the Agency Must Pay.

   a. Transportation & per diem for employee and immediate family. JTR Vol 2, Chapt 5, Part A.

   b. Transportation and temporary storage of HHG. JTR Vol 2, Chapt 5, Part D.

   c. Miscellaneous Expense Allowance (MEA). JTR Vol 2, Chapt 5, Part G.

   d. Non-temporary (extended) storage of HHG. JTR C5195-A.

e. Relocation income tax allowance (RITA). JTR Vol 2, Chapt 16.

2. Relocation Allowances the Agency Has Discretion to Pay For:

a. POV shipment. JTR Vol 2, Chapt 5, Part E.

b. Property management services. JTR Vol 2, Chapt 15, Part B.

c. TQSA. DSSR § 124.

B. **Approval Needed**. "Movements between foreign areas during the initial tour, including movement at the game [sic, same] duty location to another activity, of employees who have less than one year of service at their current overseas duty location are prohibited, unless concurred in by the losing activity, or the movement results in a promotion for the employee." OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-7a.

1. Its not clear if this provision:

a. Applies during the, for example, entire initial 3-year tour, or is limited to the first year of a tour;

b. Or the first year limitation only applies to movements within the same location

C. **And the 5 Year Rule**. When the employees foreign service exceeds 5 years and the employee is covered by the 5 year limit, the major command of the losing activity must also approve the assignment. This authority may be redelegated. OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-7b.

D. **Transportation Allowances & Reassignment Between Overseas Locations**.

1. TQSE is not authorized, instead employees receive Temporary Quarters Subsistence Allowance (TQSA).

(1) TQSA is payable if the employee is eligible for a Living Quarters Allowance (LQA). JTR C1003

(a) LQA eligibility is described in DoD Dir 1400.25-M, SC 1250.5, and DSSR § 131.1

(b) TQSA rules are in DSSR § 120.

2. No House-hunting Trip. Expenses of transportation of the employee and employee's spouse for travel to seek permanent residence quarters at a new official station is limited to where the official stations are located within the United States. 5 U.S.C. 5724a(b)(1).

XIX. RETURN TO OCONUS AFTER RETURNING TO THE UNITED STATES.

A. **Basic Rule**. DON employees who have returned to the United States following 5 years service in a foreign area, must complete 1 year of "U.S. residency" prior to serving another tour in a foreign area. OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-8 "Residency Requirement."

1. This rule also applies if the combined prior overseas service (presumably in the prior tour, not the person's entire career) and the proposed initial overseas tour will exceed 5 years. *Id.*

2. The commanding officer of the "holding activity," i.e., the State-side activity, has the authority to waive the 1 year requirement. *Id.*

XX. EARLY RETURN EMPLOYEES & DEPENDENTS, EMERGENCIES, DANGER & DEATH.

A. **Management Directed Return of Employee From Overseas**.

1. "The head of an overseas activity may direct the return of an employee at any time if the action is in the best interest of the Navy." OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-8a [sic, 5-6a].

2. The grounds for directing the return of an employee from overseas is stated in OCPMINST 12352.1, CPI 352.8, subchapter 8-7 (March 11, 1988).

a. In addition to the end of the employee's overseas tour or extension, employees can be directed to return:

(1) "When the overseas activity determines the employee cannot adjust to the overseas area for reasons not related to performance." *Id.*, at SC 8-7.a.(2).

(2) When the employees skills were not properly matched to the job requirements and there are no other duties to which the employee can be assigned. *Id.*, at SC 8-7.a.(3).

(3) When the employee fails to satisfactorily complete a supervisory or managerial probationary period during the initial tour. *Id.*, at SC 8-7.a.(4).

(4) When the overseas activity determined the holding activity (e.g., the CONUS activity) knew of adverse suitability information about the employee at the time of the overseas assignment (and apparently failed to disclose that to the overseas activity). *Id.*, at SC 8-7.a.(5).

(5) In order to eliminate the need for a RIF. *Id.*, at SC 8-7.a.(6). Which seems inconsistent with the information in paragraph 3 below.

b. If the grounds for the return are SC 8-7.a.(2)-(6), both the overseas and holding activity (e.g., the CONUS activity where the employee came from) have to agree to the return. "If the holding activity disagrees, the case will be referred to the next higher echelon command of the holding activity for resolution." *Id.*, at SC 8-7.b.

3. Management directed returns will not be used:

(1) Because the employee's position can be filled locally;

(2) "As a means of requiring an employee to return to the U.S. simply because the individual has been overseas for more than live [sic, five] years when the employee is exempt from returning under the rotation program."

(3) In lieu of a RIF.

OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-8b [sic, 5-6b].

4. Placement Into A Position Upon Return From Overseas. OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-8c [sic, 5-6c].

    a. May also involve waiving time remaining on a TA or denial of renewal agreement travel (RAT). *Id.*

    b. Notify the employee to permit the individual to release within 45 days of designation of a stateside position. An employee who fails to accept a directed return will be separated. *Id.*, at ¶5-8c(1) [sic, 5-6c(1)].

    c. If the employee does not have return rights to a position, the return is through the PPP. Return may also be accomplished through reassignment to a position at an activity in the U.S. under the cognizance of the overseas major command. *Id.*, at ¶5-8c(2) [sic, 5-6c(2)]. For example, an overseas NAVSUP employee could simply be reassigned to a NAVSUP position in the States.

    d. "When emergency situations require the immediate departure of the employee from the overseas area, after coordination with the cognizant major command, the overseas activity will give the employee the 30-day notice of adverse action and immediately return the employee to the U.S. where the adverse action will continue after the employee's return. The adverse action will be effected after the 30-day notice period." *Id.* at ¶5-8c(3) [sic, 5-6c(3)].

        (1) Care must be used to insure the employees departure doesn't preclude the employee's ability to respond to the charges.

        (2) Also, the provision would seem to preclude effecting an adverse action in less than 30 days.

B. **Early Return of Dependents From Overseas**. (The statute does not apply to Foreign Service employees. 5 U.S.C. 5729(c).)

1. For employees whose post is outside the continental United States, an agency "shall pay ... not more than once before the return to the United States ... the expense of transporting his immediate family and of shipping his household goods and personal effects from his post of duty

to his actual place of residence [in the United States] ... ." 5 U.S.C. 5729(a). The agency will do this when,

a. the employee "has acquired eligibility for the transportation" 5 U.S.C. 5729(a)(1); or

b. "the public interest requires the return of the immediate family for compelling personal reasons of a humanitarian or compassionate nature, such as may involve physical or mental health, death of a member of the immediate family, or obligation imposed by authority or circumstances over which the individual has no control." 5 U.S.C. 5729(a)(2).

2. Early return of dependents can be used if there is a divorce or a dependent turns 21 while overseas. 41 C.F.R. 302-3.227 (divorce), 302-3.228 (turned 21).

3. Where the employee has not acquired eligibility for transporting the family home or where there was no public interest basis for returning the family from overseas, the employee maybe reimbursed for the expenses of returning to the United States when the employee acquires eligibility for the transportation expenses. 5 U.S.C. 5729(b).

C. **Pay Allowances for Adverse & Dangerous Conditions**.

1. Advance Pay for Medical Treatment. Up to three months advance pay can be paid to an employee hired with a U.S. government employee family preference, who is a U.S. citizen "officially stationed or located outside the United States" and requires medical treatment outside the United States for himself or a family member. 5 U.S.C. 5927(a)(2)(B).

2. Pay - Post Differential For Especially Adverse Conditions. An additional incentive of up to 15% above the normal 25% limit on a post allowance, is allowed "for an assignment to a post determined to have especially adverse conditions of environment." 5 U.S.C. 5925(b). May be paid:

- For each assignment to such a post. 5 U.S.C. 5925(b)(1).

- Periodically or in a lump sum. 5 U.S.C. 5925(b)(2).

3. Pay - Danger Pay Allowance. 5 U.S.C. 5928; DSSR §650.

a. Conditions for Granting. An employee serving in a foreign area may be granted a danger pay allowance:

- on the basis of civil insurrection, civil war, terrorism, or wartime conditions,

- which threaten physical harm or imminent danger to the health or well-being of the employee.

5 U.S.C. 5928. "These conditions do not include acts characterized chiefly as economic crime." DSSR § 652a.

(1) A danger pay allowance is established by the Secretary of State when, and only when, civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well being of a majority of employees officially stationed or detailed at a post or country/area in a foreign area. DSSR § 652g.

(2) The presence of nonessential personnel or dependents shall not preclude payment of an allowance under this section. 5 U.S.C. 5928. This was a change made in 1983 by Public Law 98-164. Nevertheless, the State Department continues to consider the presence of nonessential personnel and dependents with respect to the amount of the danger allowance. DSSR § 652f.

b. Sense of Congress. "In recognition of the current epidemic of worldwide terrorist activity ... it is the sense of Congress that the provisions of section 5928 ... relating to the payment of danger pay allowance, should be more extensively utilized at United States missions abroad." Pub. L. 98-533 § 304, Oct. 19, 1984, 98 Stat. 2711.

c. Amount. The "amount of danger pay shall be the same flat rate amount paid to uniformed military personnel as imminent danger pay." DSSR § 652g. The total amount may not exceed 25% of basic pay, either alone or combined with a "Post Allowance for Living in an Especially Adverse Area" (which cannot exceed 15% of basic pay). 5 U.S.C. 5928 referencing 5 U.S.C. 5925(b); DSSR § 651a.

(1) State Department employees, by way of comparison, get danger pay at rates of 15, 20, or 25 percent. DSSR § 652f.

(2) The danger pay allowance is not part of the basic compensation for computing within-grade increases, merit pay increases or other bonuses. DSSR § 657.

d. State Department Controls. The State Department controls whether other agencies can provide a danger pay allowance to their employees.

(1) "Under circumstances defined by the Secretary of State, a danger pay allowance may be granted to civilian employees who accompany U.S. military forces designated by the Secretary of Defense as eligible for imminent danger pay." DSSR § 652g.

(2) "The Secretary of State will define the area of application for civilian employees ... ." DSSR § 652g.

(3) "Danger pay authorized under this subparagraph will not be paid for periods of time that the employee either receives danger pay ... that would duplicate political violence credit." DSSR § 652g.

(4) Exceptions. The Secretary of State may not deny a request by the DEA or FBI to authorize a danger pay allowance for any employee of such agency. 5 U.S.C. 5928 note.

e. State Department Reporting Requirements. When the allowance is initiated or terminated, the Secretary of State shall inform the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate of the action and the justification.

4. Pay - Hostile Fire Pay. 5 U.S.C. 5949. May be paid at the "rate of $150 for any month."

a. Conditions for Granting. The employee was:

- Subject to hostile fire or mine explosions, 5 U.S.C. 5949(a)(1); or,

- On duty in an area where there was an imminent danger of being exposed to hostile fire or mine explosions and other employees were subject to hostile fire or mine explosions. 5 U.S.C. 5949(a)(2); or

- Killed, injured, or wounded by hostile fire, mine explosion, or hostile action. 5 U.S.C. 5949(a)(3). Where hospitalization results, the employee may receive hostile fire pay for not more than three additional months while the employee is hospitalized. 5 U.S.C. 5949(b).

b. Limits on Granting. Hostile fire pay cannot be paid when the employee receives:

- a Post Allowance "because of exposure to political violence." 5 U.S.C. 5949(c) *referencing* 5 U.S.C. 5925; or,

- a danger pay allowance. 5 U.S.C. 5949(c) *referencing* 5 U.S.C. 5928.

5. Detail to Posts With Danger Pay & U.S. Troops Involved in Warfare. DSSR § 541. Applicable to State Department Employees (application to DOD employees is unknown).

a. An employee who serves for a period of 42 consecutive days or more on detail at a hardship differential post (DSSR 511c) where there is widespread warfare, U.S. combat troop involvement in hostilities, and has a danger pay designation may be granted the hardship differential at the prescribed rate for the number of days served, beginning the first day of detail. See DSSR 920, footnote "n".

b. The hardship differential eligibility shall continue during periods of leave and other absences from the footnote "n" posts, including travel to the U.S. for 30 days or less. Leave of 30 days or less will not interrupt the hardship differential for either eligibility or payment purposes.

c. An employee on leave from a footnote "n" post for more than 30 days will be required to meet the 42-day eligibility requirement on return to a hardship differential post.

6. No Leave Charged for Absence. Leave may not be charged for an absence from duty, not to exceed one year, due to an injury incurred while serving abroad and resulting from war, insurgency, mob violence, or similar hostile action. 5 U.S.C. 6325(1). This exemption does not apply where the absence was the result of the "vicious habits, intemperance, or willful misconduct on the part of the employee." 5 U.S.C. 6325(2).

7. Comparison to Combat Pay for Military. Actually, "combat pay" is something of a misnomer as there is no such specific allowance. Rather, "combat pay" is a collection of allowances military personnel can qualify for.

   a. Tax Exemption - The Qualified Hazardous Duty Area Income Tax Exclusion. This is earned for the month by spending a minimum of a day in, or a mission over, the combat zone.

   b. Hostile Fire/Imminent Danger Pay. All service members in Iraq qualify for this. Congress increased this pay from $150/month to $225/month in April 2003, retroactive to October 2002. This category of pay is earned by the month for spending a minimum of one day in the designated area. This pay was set to expire October 30, 2003, but was funded through October 2004 in an Iraq supplemental bill.

   c. Hardship Duty Pay. All military personnel in Iraq qualify for this. It is $100 per month.

   d. Family Separation Allowance. For service members with families. Congress increased the allowance from $100/month to $250/month in April 2003, retroactive to October 2002. Set to expire October 30, 2003, it was funded through October 2004 in an Iraq supplemental bill.

   e. Related Category of Hazardous Duty Incentive Pay. This is a general category covering many different types of incentive pay. This pay is earned regardless of whether performed in a combat zone. The pay is generally paid at a rate of $150 per month to service members whose orders require them to participate in frequent and regular duties considered arduous or hazardous. It is typically prorated per day, that is, a service member who performs these duties for less than a month would receive $5.00 per day. Examples of this type of pay are, Crew Member Flight Pay, Non-crew Member Flight Pay, Parachute Duty Pay, Demolition Duty Pay, Toxic Fuels Duty Pay, Dangerous Viruses Lab Duty Pay, and Chemical Munitions Pay.

D. **Evacuations from Overseas Areas**.

1. Transportation Expenses For Evacuation. When an employee is on duty in, or is transferred or assigned to duty, at a place designated by the head of the agency as a zone:

    - from which his immediate family should be evacuated; or

    - to which immediate family members are not permitted to accompany him;

    Because of:

    - military or other reasons which create imminent danger to life or property;

    - or adverse living conditions which seriously affect the health, safety, or accommodations of the immediate family.

    Government funds may be used to transport the immediate family and household goods and personal affects to a location designated by the employee. 5 U.S.C. 5725(a).

2. If the employee cannot designate a location, or it is administratively impracticable to determine his intent, the immediate family may designate the location. If the destination is also inside a zone into which movement of the family is prohibited, then the employee or his family may designate another alternative.

3. When the employee subsequently returns from the danger zone to a new permanent duty station, and his family is not excluded from the location, Government funds may be used to transport the immediate family and household goods and personal effects from their designated or alternate location to the new PDS. 5 U.S.C. 5725(b).

4. Who Has Authority To Order Evacuation of Employees and Dependents From a Foreign Area? Normally, the "decision to evacuate employees and/or dependents from a foreign area rests with the State Department." JTR C12000 ¶B.1.

    a. SECDEF Consulting With Secretary of State. "In appropriate circumstances, such as a Presidential declaration of national emergency or directed reinforcement of U.S. Armed Forces in a theater, or to accommodate force protection or anti-terrorism considerations, the Secretary of Defense, after consultation with

the Secretary of State, may authorize the evacuation of all DoD noncombatants." JTR C12000 ¶B.1.

(a) NOTE: The authority of the Secretary of Defense does not apply to the Defense Attaché Offices, Marine Security Guard Detachments, DoD elements or personnel that form an integral part of the U.S. Country Team, and others as determined between the Combatant Commander and the Chief of Mission. JTR C12000 ¶B.1, *citing* Memorandum of Agreement Between DOS and DoD, 14 July 1998.

b. Combatant Commander, Senior Country Commander or Defense Attaché. "When U.S. citizens are endangered but timely communication with the State Department is not possible, or there is no State Department presence in the area concerned, and time and communications do not permit the Commander to receive authorization from the Secretary of Defense (USD (P&R)) without jeopardizing the U.S. citizens, the commander of the Combatant command or the senior commander in the country concerned or the Defense Attaché is responsible for authorizing or ordering an evacuation of the area." JTR C12000 ¶B.1.

5. Where the Employee or Dependents Can Be Sent To. JTR C12000 ¶B.2.

a. From the employee's PDS to a **Safe Haven** pending a determination as to their:

a. return to the PDS from which evacuated;

b. transfer or reassignment of the employee to another PDS;

c. return to actual residence; or

d. transportation to the final safe haven.

JTR C12000 ¶B.2.

b. Rejoining the Family. If it is determined that the "employee and/or dependents are not to return to the evacuated PDS, transportation for the employee and/or dependents and HHG

may be authorized from the PDS or safe haven to the employee's next PDS." JTR C12000 ¶B.2;

c. Where the employee was not serving under a transportation agreement, the employee and family would be returned to their "actual residence," i.e., their State-side residence. JTR C12000 ¶B.2.

6 Third Country Nationals. On a case by case basis, as determined by the head of agency, third country national employees and/or their dependents should be considered for evacuation travel to their country of origin or point of hire rather than to other designated foreign or CONUS safe havens, if it is in the U.S. Government's interest and authorized by the Secretary of State. DSSR § 631a(4).

7. Safe Haven. JTR C12000 ¶D.

a. "Safe haven" means:

- a location or place officially designated by the Secretary of State to which an employee and/or dependent(s) is ordered or authorized to depart. DSSR § 610 ¶l(1) ["L"].

- an alternate safe haven is a safe haven authorized through the Secretarial Process under individual circumstances when in the U.S. Government's interest. DSSR § 610 ¶l(2) ["L"], *reproduced at* JTR C12000 App. I, Part A.

b. The Typical CONUS Safe Haven. Typically, the designated safe haven will be "CONUS" with the member deciding what specific location. JTR C12000 ¶D; DSSR chapter 600 Evacuation FAQS no. 3.

(1) Depending on how the evacuation is organized, the evacuee could make the decision on the final destination either when departing the PDS or at the entry station in the CONUS, e.g., flight arrives from overseas PDS at Norfolk, where evacuees are processed and evacuees make determination on final destination there.

(2) An evacuee is not required to remain at the official safe haven; however, SEA payments are based on the official safe haven location per diem rate. An evacuee can change safe havens to somewhere else in CONUS once during an

evacuation. Transportation between safe havens may be authorized sparingly through the Secretarial Process (JTR C12000-B2d) for reason(s) other than only personal preference. DSSR chapter 600 Evacuation FAQS no. 3.

c. When a limited evacuation is authorized/ordered (see JTR C12000-C3), the safe haven is the location of the nearest available accommodations, which may be Government quarters, determined to be suitable by the authority who ordered the limited evacuation.

8. Agency Reporting Requirements & Further Approval for Evacuation Benefits.

a. Fist Report is made when an evacuation is ordered/authorized to the head of agency who forwards a copy to the Department of State. The report must contain the following information:

a. names of evacuated employees;

b. names of evacuated dependents;

c. feasibility of officially reassigning evacuated employees to other positions;

d. number of evacuated employees and skills needed to reactivate the post; and

e. any other facts or circumstances which may aid in determining whether or not evacuation payments are necessary beyond the first 60 days of the evacuation period.

DSSR § 624.

b. Second Report, similar to the first, this report is made 45 days after the evacuation. The purpose of the second report is to determine the number of evacuated employees who need to be retained as the civilian staff available for the performance of duty for whom evacuation payments may be continued beyond the first 60 days of the evacuation. DSSR § 624.

9. Work Assignments for Evacuated Employees. Evacuated employees at safe haven may be assigned to perform any work considered as

necessary or required during the evacuation period without regard to the grades or titles of the employees. DSSR § 625.1. Failure or refusal to perform assigned work may be a basis for terminating further evacuation payments and/or taking disciplinary action. DSSR § 625.2.

10. Evacuations & Privately Owned Vehicles (POVs). The limit on shipping POVs is found at 5 U.S.C. 5727(a) which states that "an authorization in a statute or regulation to transport the effects of an employee ... at Government expense is not an authorization to transport an automobile" unless shipping the POV is "specifically authorized by statute." The statutes covering "emergency evacuations" don't mention shipment of POVs, consequently, the regulations state, "There is no authority to ship a POV in connection with an evacuation." JTR C12000.F; DSSR § 631b. Instead POV's may be put into "emergency storage" and subsequently shipped to the employee's new PDS.

    a. Emergency Storage.

        - Only done in the event of an evacuation of the employee and/or dependents. JTR C11007.A.

        - Authorized only when the POV "was transported, or authorized to have been transported, at Government expense to the PDS" or the POV was driven to the PDS where "POV use was determined to be 'in the Government's interest.'" JTR C11007.A.

    b. Where Stored. Although written backwards, the JTR allows POVs to be stored anywhere from the PDS where the evacuation took place to the place where the employee was evacuated to. JTR C11007B.

    c. Authorized Expenses. About the only item excluded from allowable expenses in relation to storage of the vehicle is insurance carried on the POV. JTR C11007C.

    d. Subsequent Shipment. "A POV may be shipped at Government expense ... in connection with an employee's PCS to a new PDS or upon return of the employee serving under a transportation agreement to the actual residence following separation from the OCONUS PDS." JTR C12000 F.

11. Payments & Allowances.

    a. Affect of Evacuation on Overseas Allowances When: Family Ordered/Authorized to Depart – Employee Remains at Post.

        (1) Post Allowance. After all members of an employee's family depart, the post allowance is reduced to the "employee without family" rate. DSSR § 621.1(a).

        (2) Living Quarters Allowance (LQA). LQA may continue at the "with family" rate for a period NTE six months. DSSR § 621.1(c) .

        (3) Temporary Quarters Subsistence Allowance (TQSA). If the sponsor is on TQSA when the evacuation occurs, if early return of the employee's family to the post is anticipated, TQSA may continue at the rate prescribed in DSSR §§ 120 and 925. DSSR § 621.1(b).

        (4) Education Allowances for Dependents. See discussion at DSSR § 621.1(d).

    b. Affect on Overseas Allowances When: Employee & Family Ordered/Authorized to Depart.

        (1) Post Allowance. Terminates as of the close of business of the departure day from the post. DSSR § 621.2(a).

        (2) Living Quarters Allowance (LQA). Terminates as of the close of business of the departure day of the employee from the post, unless the employee is required to maintain and pay for quarters at the post or unless lease termination is impossible or impracticable. DSSR § 621.2(c).

        (3) Post Differential and Danger Pay. Both payments terminate in accordance with DSSR §§ 532, 654.2, respectively. Subsequent eligibility for these benefits to an evacuated employee at the safe haven or other temporary duty stations is governed by DSSR §§ 540, 655, respectively. DSSR § 621.2(f).

        (4) Temporary Quarters Subsistence Allowance (TQSA). If the employee is on TQSA, the allowance is terminated as

of the close of business of the departure day from the post. DSSR § 621.2(b).

(5) Education Allowances for Dependents. See discussion at DSSR § 621.2(d).

c. TQSA & TQSE PCS Allowances Not Allowed. TQSE is not authorized for an evacuation. JTR C12000 G. Neither is TQSA authorized. TQSA is for temporary quarters and expenses "immediately preceding **final** departure from that PDS if the employee is eligible for a Living Quarters Allowance (LQA)." JTR C1003 (emphasis added).

d. Pay & Allowances During Evacuation. There are two general authorities for payments and allowances for civil service employees and their families during evacuations:

- 5 U.S.C. §5522 provides authority for advance pay, allowances, and differentials when an employee and/or dependents are authorized or ordered to evacuate the employee's PDS; and,

- DoD Instruction 1400.11, adopted the governing provisions of the DSSR chapter 600, " Payments During an Ordered/Authorized Departure," *reprinted in* DoD Instruction 1400.11, Appendix I, Part A (annotated and modified to relate to DoD employees).

e. Who Is and Isn't Authorized Evacuation Payments & Allowances.

(1) The provision on payments and allowances applies to DOD civilian employees and third-country nationals (i.e., individuals who are not nationals of the country where the evacuated post is located), DSSR § 612.1.(1).

(2) The evacuation payments and allowances provisions do not apply to the following:

(a) Locally hired American citizens who work for the U.S. Government but who do not have a Transportation Agreement. DSSR § 612.3.(2).

(b) Local United States citizens who do not have official U.S. Government employment, including but not limited to, Americans with private business or organizations, teachers recruited by local American-supported schools, ... and individuals with contracts to work for the host government. DSSR § 612.3.(1).

(c) Dependents of uniformed personnel; they are covered by Joint Federal Travel Regulations, Volume 1, (JFTR), Chapter 6, Part A. DSSR § 613b.

(d) Uniformed members are not evacuated; they are sent TDY as required. DSSR § 613b.

(e) Employees/dependents who have not yet arrived at the PDS at the time of the evacuation/departure order do not get evacuation allowances. DSSR § 639. But, the employees/dependents who have not yet arrived may be eligible for payments equivalent to those evacuated in chapter 600 "Payments During Evacuation/Authorized Departure" under limited circumstances. DSSR § 639, referencing § 245.

(f) DSSR § 245 provides that unless otherwise directed by the "head of agency," employees or family members unable to proceed to a post due to evacuation of the post, qualify for benefits equivalent to those being evacuated provided the following criteria have been met:

(i) transfer orders have been issued, and

(ii) one of the following applies:

(I) HHG have been packed out and residence quarters vacated; or

(II) the employee transferring from a U.S. post has an irrevocable contractual agreement for lease or sale of residence; or

(III) employee transferring from a foreign post with direct transfer orders (i.e., no home leave or

equivalent prior to reporting to the new foreign post) is required to vacate residence quarters;

and

(iii) "on the date of the ordered/authorized departure order the employee is within 60 days of scheduled departure directly to the new post of assignment.

DSSR § 245.

(g) Transitional SMA. Finally, if the criteria for payments under neither chapter 600 nor section 245 are met, then dependents who normally would accompany an employee to post are eligible for involuntary separate maintenance allowance under DSSR § 260. DSSR § 639; chapter 600 Evacuation FAQS no. 20.

f. The entitlement to advance pay and allowances ends:

- when the employee is determined as covered by the Missing Persons Act (50 App U.S.C. §1001 et seq.),
- unless payment is earlier terminated under these regulations,
- or, unless determined otherwise by the Secretary of State.

DSSR § 613.

12. Advance Pay. An employee may be paid in advance of the normal pay day to help defray the immediate expenses incident to an evacuation of an employee and/or dependents. DSSR § 616. The advance is for a maximum of 30 days "salary" based on the compensation rate including any allowances or post differential to which the employee was entitled immediately prior to the ordered/authorized evacuation. DSSR chapter 600 Evacuation FAQS no. 18.

a. Any advance payment includes any allowances or post differential for which an employee was eligible immediately prior to the evacuation order/authorization issuance. DSSR § 617.

b. The advance payment includes pay to be received, DSSR § 617.1, during a period of ordered evacuation or authorized departure, DSSR § 610.i, and presumably includes pay for salary earned but not yet paid.

c. The advance payment is made at any time after the evacuation order/authorization is given, but not later than 30 days after the employee/dependent(s) has evacuated from the PDS. DSSR § 617.2.b.

d. Repayment of Advance Pay. Repayment (offsets against salary and allowance payments, DSSR § 620) is not required as long as the evacuation order/authorization remains in effect. DSSR § 622.d referencing §§ 618 and 638 (reconciling employee accounts). Repayment of the indebtedness is made either in full or in partial payments as agreed upon by the payroll officer and the employee. DSSR § 618.1. Recovery of indebtedness for an advance payment may not be required if the head of agency determines that recovery is against equity and good conscience or against the public interest IAW agency procedures. DSSR § 618.2.

13. Evacuation Allowances - General Rules. DSSR § 630.

a. The employee is responsible for normal family living expenses.

b. Only one departure from the PDS is permitted an evacuee during any one evacuation period.

c. In determining the direct added expenses payable as special allowances under these regulations, an agency should consider the applicable allowances as the maximum amounts payable.

14. Evacuation Allowances - Evacuation Travel Expenses.

a. Travel expenses are IAW the JTR for TDY travel. DSSR § 631, *citing* JTR C3150.

(1) Per diem is authorized for dependents at a rate equal to the rate payable to the employee, except that the rate for dependents under 12 years old is one-half of this rate. DSSR § 631

(2) Per diem is payable from the date of departure from the evacuated area through the date of arrival at the safe haven, including any delay period en route that is beyond an evacuee's control or that may result from evacuation travel arrangements. DSSR § 631

b. When CONUS is the Safe Haven, travel is authorized to the employees home leave point or any other CONUS location. DSSR § 631a.(1).

c. Dependents who departed earlier than the employee and the employee has been ordered to a different CONUS safe haven, the agency will pay for dependent travel to join the employee. DSSR § 631a.(1); DSSR chapter 600 Evacuation FAQS no. 5.

d. Dependent travel and transportation expenses to and from an alternate OCONUS safe haven are reimbursed NTE a constructed cost calculation from the evacuated post to the employee's CONUS safe haven. DSSR § 631a.(1).

e. When an evacuee is away from a post on official travel the agency will pay travel expenses for the employee to reach safe haven from his her location and from the dependent's location. DSSR § 631a(2).

f. When an employee/dependent is away from the PDS on personal travel, travel expenses to the safe haven location are constructed cost, NTE the cost of travel and transportation from the evacuated post to the safe haven location.

15. Evacuation Allowances - Unaccompanied Baggage, the "Airfreight Allowance" & "Airfreight Replacement Allowance." An airfreight allowance for unaccompanied baggage is authorized for authorized/ordered departure from/return to post. DSSR § 631a(3) *citing* JTR C8020).

a. Airfreight Replacement Allowance. If the airfreight allowance is not used because of circumstances beyond the evacuee's control this replacement allowance may be granted to help defray costs of items, normally part of the authorized airfreight shipment, which must be purchased. The flat amounts are as follow:

- First evacuee without family: $250;

- First evacuee with one family member: $450;

- First evacuee with two or more family members: $600.

Receipts are not required for this allowance. DSSR § 631a(3)

b. Even when the airfreight replacement allowance is granted from post, evacuees are still eligible for an airfreight allowance when/if they return to post. DSSR § 631a(3).

16. Evacuation Allowances - Transportation Allowance at Safe Haven. In the absence of a POV at the safe haven location, a transportation allowance is paid from the first day following arrival day at the safe haven location. Receipts are not required. The amounts payable are:

- for first evacuee without family, $10 per day;

- for first evacuee with one family member, $15 per day;

- for first evacuee with two or more family members, $20 per day.

DSSR § 631b.

17. Evacuation Allowances - Subsistence Expense Allowance (SEA). Unless otherwise directed by the Secretary of State, SEA is available. DSSR § 632.

a. Duration of SEA. The DSSR suggests that a new evacuation order would have to be issued each 180 days. "Payment commences as of the date following arrival day of the evacuee at an authorized safe haven ... and may continue NTE day 180 ... ." DSSR § 632. BUT, the same DSSR § also states, "any subsequent order issued after the 180th day constitutes a separate order, starts a separate 180-day period, and applies only to evacuees departing under that order." Apparently, an agency could continue past the initial 180 days by issuing a new order for those evacuees/dependents who are still at the safe haven.

b. Termination of SEA. As long as the SEA payments have/will not exceed 180 days:

(1) Employees NOT returning to the foreign PDS, are allowed three days of SEA following termination of the evacuation order as long as the employee has not started PCS travel to another PDS (when travel per diem would be applicable). DSSR chapter 600 Evacuation FAQS no. 17.

(2) For employees/dependents returning to the evacuated PDS, an additional seven days SEA may be authorized due to transportation delays. An evacuee must provide a statement on the travel voucher justifying the additional days required to arrange for return transportation to the foreign PDS (e.g., airline reservations or air freight pick up). DSSR chapter 600 Evacuation FAQS no. 17.

(3) Personal reasons do not justify additional days of SEA. DSSR chapter 600 Evacuation FAQS no. 17.

c. SEA is paid from the day following arrival day at the safe haven location by the first evacuee. DSSR § 632.

d. Reimbursement is made according to either a commercial lodging or non-commercial (e.g. government provided quarters) lodging rate. DSSR § 632.1 (a). The commercial rate requires a lodging receipt.

e. SEA is divided into two periods, day 1-30 and the 31st through 180th day. DSSR 632.1 (a).

f. The employee may choose to be the "first evacuee" if evacuated, even if evacuated after the dependent(s). There is only one "first evacuee", except as provided under DSSR § 632.4(b) ("Tandem Couples"). DSSR 632.1(a).

g. <u>SEA (Lodging) Commercial Rate</u>.

(1) Days 1-30 following arrival day at the safe haven location, DSSR 632.1(b)(1) :

- For the first evacuee, up to 100 percent of the lodging portion of the safe haven locality per diem rate (receipt required) (any tax on lodging is separately reimbursed), plus a flat amount (no

receipts required) equal to 100 percent of the M&IE portion of the safe haven locality per diem rate.

(2) With up to 150 percent of the lodging rate for special family compositions (non-spouse dependents age 18 or older or age 12 or over of the opposite gender).

(3) For each additional evacuee age 18 or older, a flat amount equal to 100 percent of the M&IE, and a flat amount equal to 50 percent of the M&IE for each additional evacuee under age 18.

(4) Amounts allowed from the 31st day through the end of the evacuation are, DSSR 632.1(b)(2):

- For the first evacuee the lodging remains the same but M&IE drops to a flat amount (no receipts required) equal to 80 percent;

- For each additional evacuee age 18 or older a flat amount equal to 80 percent of the M&IE, and 40% of M&IE for each additional evacuee under age 18.

(5) Where the employee signs a lease for lodging at the safe haven and is then ordered to return to post, the employee can get a waiver of the refund due the government on any overpayments of allowances, for up to 30 days of the unexpired portion of the lease not to exceed per diem rates. DSSR 632.1(b)(3) *referencing* § 632.4(c).

h. SEA Non - Commercial (Lodging) Rate.

(1) Days 1 - 30 from the day following arrival day at the safe haven location, DSSR 632.1(c) (1), are:

- For the first evacuee, a flat amount of 10 percent of the lodging portion of the safe haven per diem rate (no receipts required) plus a flat amount of 100 percent of the M&IE;

- For each additional evacuee age 18 or older a flat 100 percent of the M&IE, and 50% M&IE for each additional evacuee under age 18.

(2) The per day amounts allowed from the 31st day through the end of the evacuation are: for the first evacuee, no lodging reimbursement is provided and a flat amount (no receipts required) of 80 percent M&IE is paid. For each additional evacuee age 18 or older a flat amount equal to 80 percent of the M&IE, and 40% M&IE for each additional evacuee under age 18. DSSR 632.1(c)(2).

i. Suspension of SEA. SEA payments are suspended in the applicable per-person amount when the employee or dependents are authorized the travel expense allowance under DSSR section 631, travel per diem, or educational travel under DSSR section 280. If SEA payments are temporarily suspended for the first evacuee, another dependent also receiving SEA becomes the first evacuee and receives the higher SEA payment. DSSR § 634.

18. Evacuation Allowances - Access to Household Goods (HHG) in Storage. Access to HHG in storage (e.g., in CONUS), or delivery and return to storage, is NOT covered and is at evacuee's personal expense. DSSR § 631b.

19. Evacuation Allowances - Special Education Allowance.

a. When the Official Safe Haven is in a foreign area, and the school is at the safe haven, then the school allowance would be the "school at post" rate for the safe haven. DSSR § 633.1(a).

b. When the children are sent away from the foreign area safe haven to schools necessitating boarding, the school allowance rate is the "school away from post" rate of either the PDS or safe haven, at the discretion of the authorizing officer. DSSR § 633.1(b).

(1) Note, that the SEA ceases for the child who is sent to the boarding school. DSSR § 633.1(b).

c. When the Safe Haven is in the United States, the DSSR states, "Ordinarily, education allowances are not payable on behalf of children evacuated from a foreign PDS to a safe haven in one of the fifty United States or the District of Columbia if accompanied by a parent, **as public schools are available to all residents**." DSSR § 633.2 (emphasis added). The DSSR does not address what, if any educational allowance, is available for

those evacuees who are not legal residents of the safe haven school district.

d. When the child was already attending a school in the United States and the overseas family was receiving the "away from post" the rate authorized for the PDS may continue for the remainder of the school year. DSSR § 633.2.

20. Termination of Evacuation Allowances. The authority for allowance payments under DSSR § 620 ceases as of the earliest of the following dates:

a. the date the employee commences travel under an assignment order to another PDS outside the evacuation area;

b. the effective date of transfer when the employee is already at the post to which transferred for permanent duty;

c. the date of separation from the agency;

d. the date specified by the head of agency;

e. the date specified by the Secretary of State;

f. 180 days after the evacuation order is issued; or

g. the date the evacuee commences return travel to the previously evacuated post.

DSSR § 623.

E. **Family Visitation Travel (FVT)**. 10 U.S.C. 1599b; 22 U.S.C. 4081; JTR C6650.

1. Purpose. The purpose of FVT is to allow an employee to travel at government expense to visit immediate family members who were evacuated from the employee's foreign PDS. FVT is a discretionary allowance paid for by the employee's command. It is not authorized for travel within the foreign country of assignment. JTR C6650.A. FVT must be scheduled so as to ensure the orderly performance of official duties and should, to the maximum extent possible, be combined with travel required for official purposes. JTR C6650.J.1 - .J.2.

2. Allowable Expenses. Basically, round-trip the air fare and taxes between the airport serving the employee's foreign PDS and the destination airport. It also covers ground transportation between intermediate airports, but not the cost of getting to the origin or destination airports. Per diem and excess baggage are not authorized. JTR C6650.C.

3. Eligibility.

   a. Basic Eligibility. EVT only applies to (JTR C6650.D):

      (1) U.S. citizen employees;

      (2) Assigned to an FOCONUS PDS;

      (3) For a tour of more than one year;

      (4) Whose immediate family members were evacuated from the employee's FOCONUS PDS.

   b. Where the Family Has Relocated to CONUS or a NFOCONUS Area (JTR C6650.K):

      (1) No more than two round trips may be authorized in a year, JTR C6650.K.1, with the total cost of the FVT limited to the cost of two coach class round trips to the family's residence. JTR C6650.K.3.

      (2) FVT is allowed beginning 3 months after the family members are evacuated. JTR C6650.K.3.

      (3) FVT is not permitted within 3 months prior to a scheduled transfer, departure on RAT, or voluntary separation. JTR C6650.K.4.

      (4) There must be an interval of 3 months between trips. JTR C6650.K.5.

      (5) An employee's absence from the PDS may not exceed 48 calendar days in a year and should not ordinarily exceed 24 calendar days for any individual trip. JTR C6650.K.5 - K.6.

c. Where the Family Has Relocated to a FOCONUS Location.

(1) More than two trips are authorized but the total cost of FVT must not exceed the cost of two round trip coach class tickets. JTR C6650.L.1.

(2) FVT is allowed beginning 4 weeks after the family members are evacuated to a FOCONUS location. JTR C6650.L.2.

(3) FVT to a FOCONUS location is not permitted within 4 weeks prior to a scheduled transfer, departure on RAT, or voluntary separation. JTR C6650.L.3.

(4) There must be an interval of 4 weeks between trips. JTR C6650.L.4.

(5) An employee's absence from the PDS may not exceed 48 calendar days in a year exclusive of time spent on duty or in an official travel status. JTR C6650.L.5.

(6) Exceptions for valid reasons may be sought. JTR C6650.L.7.

F. **Death of an Employee or Dependent Overseas or In Transit**.

1. Transportation of Remains In Case of Death - Statutory Limit. The statutory discussion begins with a general prohibition that an agency "may not authorize an expenditure in connection with the transportation of remains of a deceased employee" except as specifically authorized by statute. 5 U.S.C. 5741.

2. Death of the Employee. If death occurs while the employee was in a travel status away from his "official station in the United States" or "while performing duties outside the continental United States or in transit thereto or therefrom" then the agency may pay the expense of preparing and transporting the remains to the home or official station of the employee or such other place appropriate for internment as is determined by the agency. 5 U.S.C. 5742(b)(1).

a. The agency can also pay the expense of transporting and moving the deceased employee's dependents to the employee's former home or such other place as is determined by the head of the agency concerned, "if death occurred while the employee was performing

official duties outside the continental United States or in transit thereto or therefrom ... ." 5 U.S.C. 5742(b)(2).

b. Escorts. Where the employee dies while performing official duties outside the continental United States, or in transit, the agency may pay the expenses of two persons to escort the remains. 5 U.S.C. 5742(b)(3).

3. Continuation of Housing Allowance Following Death of Employee. Where a quarters allowance would be paid except for the death of an employee, such allowance may be continued to allow any child of the employee to complete the current school year at the post or away from the post. 5 U.S.C. 5922(d).

4. Return of Dependents Following Death of an Employee. When an employee dies at post in a foreign area, a transfer allowance under 5924(2)(B) may be paid to the surviving spouse and dependents, when the spouse or dependent was residing at the employee's post of assignment or at another place outside the United States for which a separate maintenance allowance was being furnished under section 5924. 5 U.S.C. 5922(f).

5. Death of a Dependent. Where an employee is performing official duties outside the continental United States or the dependent was in transit, and a dependent who was residing with the employee dies, the agency may:

- Pay the necessary expenses of transporting the remains to the home of the dependent or such other place as is appropriate for internment as is determined by the head of the agency. 5 U.S.C. 5742(c).

- Furnish mortuary services and supplies on a reimbursable basis either when local commercial mortuary facilities and supplies are not available or the cost of such are prohibitive as determined by the head of the agency. 5 U.S.C. 5742(c)(1) and (2).

a. Reimbursement "shall be collected and credited to current appropriations available for the payment of these costs." 5 U.S.C. 5742(c).

G. **Emergency Visitation Travel (EVT)**. 10 U.S.C. 1599b (general authority); 22 U.S.C. 4081 (foreign service travel authorized); JTR Vol 2, Chapt. 6 Part

O. Overseas commanders have long had the authority to allow military members and their family to return to the United States in the event of death or serious medical emergency by close relatives in the States. Options for civilian employees in similar circumstances have been more limited until recently.

1. Old Rule. Claims for bereavement travel were denied. "Civilian employees can be reimbursed for travel expenses if they travel 'on official business.' 5 U.S.C. 5702(a) (2000); JTR C1050-B.1.a, C3300-D. Civilian employees cannot be reimbursed, however, for the expenses of personal travel. The trip Ms. Reaves made [from Korea so she and her husband could attend the funeral of a family member in the United States] was personal and was not made in connection with the performance of her official duties." *In the Matter of Lana J. Reaves*, GSBCA 16237-TRAV (January 21, 2004).

2. Old Solution. The best that could be done for civilian families was to allow them free travel on "rotater" flights back to the U.S. coast and to then take commercial travel from there paid for by the employee.

3. New Rule. In reaction to the *Reaves* case the Per Diem, Travel and Transportation Allowance Committee revised the JTR. This provision became effective September 17, 2004, authorizing EVT for eligible employees and/or family member(s).

4. The purpose of EVT is to allow an eligible employee and/or eligible family members assigned to a F-OCONUS PDS to travel at government expense in certain situations of family emergencies. JTR C6675.A.

. 5. Authorized Circumstances. Travel from the F-OCONUS PDS on EVT is authorized in circumstances involving:

   a. A serious illness or injury of an immediate family member JTR C6675.1, C6675.A.1;

   b. Death of an immediate family member JTR C6675.2, C6675.A.2 f;

   c. Other "Special Family Circumstances." "EVT is authorized ... when an eligible employee or family member:

      1. Travels to attend funeral services of a deceased person who has stood in the place of a parent, or to visit a seriously ill or injured person who stands in the place of a parent; or

2. Is the sole surviving member of the family of a seriously ill, injured, or deceased person."

JTR C6679, C6675.3, C6675.A.3.

d. To accompany the remains of "an immediate family member who (a) ordinarily resides with the employee, (b) is included in the employee's residence and dependency report, and (c) who dies in a foreign country" to "a place of interment anywhere in the world." JTR C6676.A.2.

(1) Where the place of internment is located outside the United States ("outside both the CONUS and all non-foreign OCONUS areas") the reimbursement for transportation costs is limited to "the place where the visitation travel begins and the employee's actual residence" i.e., home of record. JTR C6676.C.

e. EVT contemplates the return of the employee to work at the employee's PDS. See JTR C6675.F (Refund).

f. "Serious illness or injury" is defined as an "injury or illness from which, based on competent medical opinion, death is imminent or likely to occur, or an illness or injury during which the absence of the employee and/or eligible family member(s) would result in great personal hardship." JTR C6675.G.4.

g. "Immediate family member," that is, the persons an employee or eligible family member could fly back for "means the following relatives of the employee:

a. Spouse, and parents thereof;

b. Children, including adopted children and spouses thereof;

c. Parents;

d. Brothers and sisters, and spouses thereof; and

e. Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

JTR C6675.G.3.

(1) Note that the "immediate family" is the eligible employee's immediate family and except for the spouse's parents, not the family of the employee's spouse.

(2) Note that the "immediate family" does not specifically include grandparents, although they may meet the definition of subparagraph e.

6. "EVT is authorized. It is not a discretionary allowance." JTR C6675.A. In cases of serious illness or injury, the authorizing official "must authorize/approve requests for EVT at Government expense that meet the requirements of this Part." JTR C6677.B. "EVT expenses are the responsibility of the eligible employee's command." JTR C6675.

7. Authorization/Eligibility is limited to a combination of employee eligibility and authorized departure and destination points.

   a. Individuals Authorized to Travel.

      (1) An "eligible employee" is an employee who is a US citizen assigned to a F-OCONUS PDS, with a TA which provides for return travel to the employee's actual residence. JTR C6675.G.1.

      (2) An "eligible family member" is the eligible employee's "spouse, or children ... who are part of the employee's household." JTR C6675.G.2.

         (a) This definition excludes other individuals who are dependents of the eligible employee. It's not certain if that distinction is deliberate or not.

         (b) It is also unclear whether EVT covers the transportation of a child who is authorized to attend school at a different F-OCONUS location is considered "part of the employee's household."

   b. Authorized Departure Points. EVT is designed to get the employee and dependents **at** the F-OCONUS PDS to an authorized destination.

      (1) Employees away from the PDS on leave or TDY in CONUS or non-foreign CONUS are NOT eligible for EVT. JTR C6675.A.

(2) But, another provision of the JTR relates that EVT is available to an eligible person at another foreign country location. "EVT by an employee and/or by an eligible family member, who is either at the PDS **or away from the PDS at another foreign country location**, is authorized ... ." JTR C6676.A.1 (emphasis added).

(3) And, where the immediate family member is seriously ill or injured, or where there are remains to be accompanied, and the afflicted family member or remains of are outside CONUS or any NF-OCONUS areas, then the reimbursement of transportation costs is limited to travel from "the place where visitation travel begins," the instruction does not specify from the employee's PDS. JTR C6676.C.

(4) Also, it is not clear if EVT is allowed for an otherwise eligible child who is authorized education at a different F-OCONUS location to travel from the school.

c. Authorized Destinations For EVT Travel.

(1) EVT is authorized to CONUS, NF-OCONUS, or "other location in certain situations." JTR C6675.A.

(2) "EVT expenses are NOT permitted for travel within the foreign area/country of assignment." JTR C6675.A (emphasis added).

8. EVT is probably limited to one person, the employee or an eligible family member, but the instruction is a little unclear and EVT may be available to an employee and an eligible family member(s).

a. The introductory paragraph relates that, "The purpose of Emergency Visitation Travel (EVT) is to allow an eligible employee **and**/or eligible family member**(s)** to travel at Government expense ... in certain situations of family emergency." JTR C6675.A (emphasis added, all parentheticals original, references omitted).

b. But, another paragraph would seem limit the travel to one person, "General. Emergency visitation travel is authorized to **an** eligible employee or **an** eligible family member(s) to travel ... ." JTR C6676.A (emphasis added). But its next subparagraph would seem to allow more than EVT. "EVT by an employee **and**/or by an eligible family member ... ." JTR C6676.A.1 (emphasis added).

c. With respect to accompanying remains, the instruction is clear that EVT will be funded only for one person, "EVT is authorized/approved to enable an employee or eligible family member (one or the other) to accompany to a place of internment ... ." JTR C6676.A.2 (parenthetical original).

d. The next subparagraph suggests that EVT is only one person, but the reference is to the "member of a family" which may refer to the eligible employee and family member being the "family" or may be limiting the travel to the eligible employee and only one family member. "Ordinarily, only one member of a family may travel at Government expense on EVT. However, in exceptional circumstances, such as critical injury to a dependent child ... attending school away from PDS that requires the presence of the employee and/or eligible family member(s), or the death of a dependent at the PDS which for compassionate reasons requires the employee and eligible family member(s) to accompany the remains to interment, EVT for more than one family member may be authorized/approved." JTR C6676.A.3.

e. The last subparagraph in the section (by allowing both parents to travel when both parents are eligible for EVT travel and a dependent child is involved) suggests that ordinarily, only one person can travel on EVT. JTR C6676.A.4.

9. Number of EVTs Allowed.

a. For Serious Injury or Illness, one round trip for each serious illness or injury to visit each afflicted immediate family member or person who stood in the place of a parent or when an eligible employee or family member is the sole surviving member of a family. JTR C6677.A, C6679.1, C6679.2.

b. EVT is authorized for the death of an immediate family member or person who stood in the place of a parent or when an eligible employee or family member is the sole surviving member of a family. JTR C6678.B.

10. Allowable Transportation Expenses. This provision, JTR C 6675.C, is written in terms of travel by plane from the F-OCONUS PDS (as that would be the most common circumstance), but other modes of commercial transportation, ship, rail or bus service, are also authorized. JTR C6675.D.1 & .3.

a. Transportation costs are limited to the cost of travel from the airport serving the F-OCONUS PDS to the airport at the authorized destination and return. JTR C6675.C.

b. Authorized travel costs include air fare, airport taxes and transportation between intermediate airports en route. JTR C6675.C.1. Reimbursement must not exceed allowable transportation expenses actually incurred. JTR C6675.D.6.

c. The following costs are specifically excluded: travel to the departure airport or from the destination airport, JTR C6675.C. Note 1; and, per diem, and excess or unaccompanied baggage charges. JTR C6675.C. Note 2.

d. Travel will be by the most expeditious mode on direct routing. Indirect routing is authorized only when official duties must be performed en route, or it is to the government's advantage to purchase a ticket in a foreign currency at an intermediate point. JTR C6675.D.1 & 2.

11. Obtaining Authorization for EVT Travel & Payment Issues.

a. Authorization After-the-Fact. In cases of serious injury or illness, if the employee or eligible dependent travels at personal expense before EVT is authorized, reimbursement may be made after the fact. JTR C6677.C, E.

(1) By reference, this provision also applies where the employee or eligible family member travels visit or attend the funeral of a person who has stood in the place of a parent or where the employee or eligible family member is the sole surviving family member. JTR C6679 referencing JTR C6677.

(2) Where an eligible employee or family member has traveled at their own expense to visit an ill or injured immediate family member, and the immediate family member either dies during the visit or within 45 days after the eligible employee or family member left the PDS to make the visit, the eligible employee or family member may elect either reimbursement for the trip already undertaken or a subsequent EVT for the internment of the deceased. Reimbursement is limited to cost of transportation that would have been procured through a government travel office and is not available for transportation

under a foreign flag air carrier unless a U.S. flag carrier was not available under JTR C2204.C. JTR C6678.

b. Information to Be Provided. In cases of serious injury or illness, it is the authorizing official's responsibility to "promptly cause appropriate inquiries to be made to determine the seriousness of an illness." JTR C6677.C.

c. Payment Issues: Refund - the employee must repay the government for EVT expenses used as a substitute for travel for which EVT use is not authorized. JTR C6675.E.

XXI. NATO-COUNTRY NATIONALS - HIRING CITIZENS OF OTHER NATO COUNTRIES.

A. **Definition**. This issue is sometimes referred to as "third-country nationals" even though the phrase is used in other contexts as well. To avoid confusion, this outline uses "NATO-country nationals." As far as is known, the U.S. Forces are not hiring NATO-country nationals in Europe. The following is a discussion of what is possible under existing laws.

B. **Hiring As Host National Employees**. Hiring NATO-country nationals as host national employees depends resolution of the following issues:

1. Host-national Hiring Preferences. Some host-national union contracts, known as the Conditions of Employment (COE) in Italy, have a preference for hiring host-national citizens as host national employees. Such preferences are inconsistent with EU Regulation 1612/1968.

2. Overlap Between NATO Countries and EU. The EU prohibits hiring discrimination by member nations against the citizens of other member nations. EU Reg. 1612/1968. But not all NATO countries are members of the EU, e.g., Canada. So there is no EU prohibition against discriminating against Canadian citizens in hiring.

3. Direct Hire v. Indirect Hire Countries. Where the host-national employees who work for the U.S. Forces are legally employed by the host nation Ministry of Defense, the host nation MOD may have citizenship hiring prohibitions or preferences.

C. **Hired As Part of U.S. Civilian Component**.

1. U.S. citizenship is required for hiring into the competitive service so realistically, this limits the discussion to positions with the Exchange or MWR, i.e., to non-appropriated fund positions.

2. The NATO SOFA restrictions on the U.S. civilian component would limit consideration to dependents who have citizenship in other NATO countries (not including citizenship in the receiving state). NATO SOFA art. I.1(b).

3. Neither the military spouse preference in hiring at 10 U.S.C. 1784(b)(2), nor the family preference at 22 U.S.C. 3951(b), require that the spouse or family member be a U.S. citizen in order for the preference to apply. In other words, a Canadian spouse could qualify for a military spouse preference or a family member preference.

XXII. PERSONAL SERVICES CONTRACTS.

A. **General Prohibition**. Personal services contracting begins with the Federal Acquisition Regulation (FAR) which states, "Agencies shall not award personal services contracts unless specifically authorized by statute ... to do so." FAR 37.104(b).

Warning: Any contract can devolve into a personal services contract if government employees begin to direct contractor employees on how to perform the contract.

B. **The Employer-Employee Relationship Created Through Personal Services Contracts**.

1. Personal services contracts are "characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." FAR 37.104(a). The government normally hires via civil service laws. Obtaining personal services by contract, rather than by direct hire, improperly circumvents those civil service laws "unless Congress has specifically authorized acquisition of the services by contract." FAR 37.104(a).

2. Attributes of what constitutes personal services contracts are described at FAR 37.104(c) and (d), "the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract." FAR 37.104(c)(2).

3. The implementing DOD instruction for personal services contracts with health care providers relates:

    a. A personal services contract is a "contract that, by it express terms or as administered, makes the contractor personnel appear, in effect, to be government employees." DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶C.1 (ASD(HA) Feb 27, 1985);

    b. "DoD supervisors may direct the activities of personal services contractors on the same basis as DoD employees." DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶D.4 (ASD(HA) Feb 27, 1985); and,

    c. That personal injury claims arising alleging negligence from within the scope the contractor's performance "will be processed as claims alleging negligence by DoD military or civil personnel." DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶E.2 (ASD(HA) Feb 27, 1985).

4. Overseas Variations. Overseas, the contractor/employment status of personal services contractors will likely be determined by host nation courts using host nation legal criteria. Thus, it is possible that while under American law the personal service contract constitutes an employer-employee relationship, that under local standards a host nation court may find the relationship is principle/independent contractor. This will affect disputes in both the "employment" arena and allegations of negligence.

C. **Elements of a Personal Services Contract**. The FAR has incorporated the "Pellerzi Standards" (so-called after the Civil Service Commission General Counsel who drafted them in 1967), which are supposed to determine whether an employer-employee relationship exists.

1. FAR 37.104(d) states, "The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

    (1) Performance on site.

    (2) Principal tools and equipment furnished by the Government.

(3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

(5) The need for the type of service provided can reasonably be expected to last beyond 1 year.

(6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to-

(i) Adequately protect the Government's interest;

(ii) Retain control of the function involved; or

(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee."

2. The FAR does not mention how these factors are to be considered or weighed.

3. Remember, "the key question" is determining whether a personal services contract exists "always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract." FAR 37.104(c)(2).

a. Older GAO decisions considered not just the issue of "continuous supervision" but the amount of supervision in proportion to the type of supervision normally required for the tasks being performed. *T.C. Associates*, B-193035, Apr. 12, 1979, 1979 U.S. Com. Gen. LEXIS 2682.

b. More recent GAO decisions have tended to limit their inquiry to the question of supervision and control as stated in FAR 37.104(c)(2). Each case must be "judged in the light of its particular circumstances, with the key question being whether the government will exercise relatively continuous supervision and control over the contractor personnel performing the contract." *Information Ventures, Inc.*, B-290785, Aug. 26, 2002, 2002 CPD ¶ 152, *citing*

FAR § 37.104(c)(2); *Carr's Wild Horse Ctr.*, B-285833, Oct. 3, 2000, 2000 CPD P 210 at 7.

D. **Personal Services Contracts for Temporary or Intermittent Employment of Experts & Consultants**. The general section on employment authority, (U.S. Code Title V, Chapter 31, Subchapter 1), has a provision for the temporary (not in excess of 1 year) or intermittent employment of experts and consultants. 5 U.S.C. 3109. The Office of Personnel Management (OPM) criteria for hiring Experts and Consultants is at 5 C.F.R. part 304. The forthcoming implementation of the National Security Personnel System (NSPS) is expected to expand this authority.

1. Limits on Pay for Experts and Consultants. Section 3109(b) ostensibly limits pay rates to that of GS-15 step 10, and the implementing OPM regulation provides that unless otherwise authorized by statute, the maximum pay is the daily or bi-weekly rate for a GS-15 step10 excluding locality pay or any other additional pay. 5 C.F.R. 304.105. But the key language is the "unless otherwise authorized." Determining the actual pay limit for experts and consultants is complicated by a number of public laws and Comptroller General decisions which are not summarized here.

2. Agencies are required to report the number of days the agency employed each expert or consultant and the total amount paid them. 5 U.S.C. 3109(e); 5 C.F.R. 304.107.

E. **Personal Services Contracts for Heath Care**. There is a separate statute for personal services contracts for health care. The Secretary of Defense may enter into personal services contracts to carry out the "health care responsibilities" of the Secretary. 10 U.S.C. 1091(a).

1. Types of Health Care Services.

   a. Health Care Providers. The statutory language is broad enough to include personal services contracts for hiring health care administrators but the implementing DOD instruction is specifically limited to "[h]ealth services personnel who participate in clinical patient care and services" and specifically excludes personal services contracts where the "duties are primarily administrative or clerical ... [or for] maintenance or security services." DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶C.2 (ASD(HA) Feb 27, 1985).

b. Personal Services Contracts for Clinical Counseling, Family Advocacy Program Staff, & Victim's Services Representatives. In 1994 Congress authorized personal services contracts for these types of care providers to be executed under the provisions of 10 U.S.C. 1091. 10 U.S.C.A. 1091 note; Pub.L. 103-337, Div A. Title VII, § 704(c), Oct 5, 1994, 108 Stat. 2799.

2. Credentialing & Licensing. Contractors are subject to the same quality assurance, credentialing processes and other standards as are required for military health care providers. Providers, not including para-professionals, must be licensed in accordance with state or host country requirements. DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶D.3 (ASD(HA) Feb 27, 1985).

3. Location. Originally, personal services contracts for health care providers was limited by statute to health care facilities but the statute was changed in 1997 to allow contracts "at locations outside medical treatment facilities" such as recruiting stations. 10 U.S.C. 1091(a)(2); Pub.L. 105-85, Div A, Title VII, § 736(a), Nov 18, 1997, 111 Stat. 1814.

4. Limits on Pay. Although the statute limits contractor salary to that paid the President of the United States, the DOD instruction has a pay scale for para-professionals, nurses, physicians and dentists which remains linked to officer pay grades 0-3 to 0-6, with the proviso that the "0-6 grade shall be sued sparingly and ... subject to review." 10 U.S.C. 1091(b), *referencing* 3 U.S.C. 102 (The President's annual income in 2004 was $400,000. 3 U.S.C. 102 (2004)); DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶D.5, Encl. (1) (ASD(HA) Feb 27, 1985).

5. Procedures for Contracting.

   a. Competition for health care personal services contracts is not required when contracting with individual providers but competition is required when contracting "with entities other than individuals" (e.g., a professional corporation or partnership) or where the services will be provided outside of a medical treatment facility. 10 U.S.C. 1091 (a), (c)(2), (d).

   b. Contracts are to be awarded and administered according to the FAR and DFAR. DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶E.4 (ASD(HA) Feb 27,

1985). A draft agreement is provided as enclosure (2) to the DOD instruction.

c. In the Navy, responsibility for personal services contracts for health care falls under CNO who establishes guidance for approval/ disapproval. Delegated approval authority is to be at "the lowest command echelon possible which has the necessary expertise to properly perform such reviews." Activities wanting to contract for health care providers will forward the work statements through the chain of command to the appropriate approving authority. "No contract will be executed until approval has been obtained." SECNAVINST 4350.11 "Personal Services Contracting for Direct Health Care Providers" ¶ 4-5 (OP-933F2 Sept 17, 1986).

6. Reporting Requirements. There are extensive reporting requirements to Congress on use of personal services contracts and compensation paid to contractors. 10 U.S.C.A. 1091 note; Pub.L. 103-160, Div A. Title VII, § 721(b).

XXIII. RESTRICTIONS ON OUT-SOURCING FIREFIGHTERS AND SECURITY GUARDS. 10 U.S.C. 2465.

A. **Basic Restriction**. Congress has generally limited the ability of DOD to outsource "the performance of firefighting or security -guard functions at any military installation or facility" by prohibiting the obligation or expenditure of any funds for that purpose. 10 U.S.C. 2465(a).

B. **Exceptions**. There are limited exceptions.

1. For installations outside the United States, DOD may enter into contracts for firefighting or security guard functions where "members of the armed forces would have to be used for the performance of a [firefighting or security-guard] function ... at the expense of unit readiness." 10 U.S.C. 2465(b)(1).

2. Where the contract for firefighting or security guard functions would "be carried out on a Government-owned but privately operated installation." 10 U.S.C. 2465(b)(2).

3. Where the contract for firefighting or security guard functions, "or the renewal of a contract" existed before September 24, 1983. 10 U.S.C. 2465(b)(3).

C. **Legislative History**. This law was originally passed when Congress was interested in allowing "private industry to compete with the government sector wherever possible" with firefighters being an excepting pending reports from DOD and the U.S. Fire Administrator. "Mandatory Contracting Out Provision" S. Rep. No. 331, 99th Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 6413, 1986 W.L. 31982 (Leg. Hist.). Nevertheless, the House of Representative's version "that would permanently prohibit the contracting out of security guard functions presently being performed by Department of Defense civilians" was adopted. "Contracting Out, Legislative Provisions Adopted (§ 1111-1112)" H.R . Conf Rep. 100-446 (Nov. 17, 1987), 100th Cong., 1st Sess. 1987, 1987 U.S.C.C.A.N. 1355, 1987 W.L. 61486 (Leg. Hist.).